Series No. I.

(+) (or #) Denotes an addition to the text

(*) Used to designate a note.

(§§) The beginning of a new section.

(———) Three lines between two sections signify, that the two sections ought to be united.

Of

Title to things

Real.

by

Devise

In two books.

Book Ist

Transcribed by Geo: [illegible] July. 18[illegible]

June 11. 1821.
Aug.t 15. 1822.

Of Title to things real by Purchase.

For Escheat, Occupancy, Prescription & Forfeiture see 2 Bl. 241. 295.

So for Alienation by matter of Record, & by Special Custom. 2 Bl. 344. 383.

Of Purchase by Devise.

A devise is a mode of alienation, & may be defined: A testamentary disposition of real prop.y. Or a disposition of real property, to take effect on the death of the owner (Pow. D. 13. 5 Bac. 447.

A Will what? Lovel 1. 2.

Ancient Law. The right of devising existed among the Anglo Saxons; but was abolished on the introduction of the feudal law; it being inconsistent with the policy ~~principles~~ of feudal ~~tenures~~ law. 2 Bl. 57. 373. Pow. 1. 3.

The right was preserved, however, in some parts of England by local customs or by privileges granted by the Conqueror (Pow. 3. 5. Litt. 154. 77. Rai 59. 76) 1 Lov. 7. Sal 237. 2 Bl 374.
as in Kent. &c.

Title by Devise.

By ye ancient Law.

Terms for years & chattel interests generally were not affected in this particular by the feudal system being personalty only (Pow. 6. 2 Bl. 374. 2 Ins. 7. [illegible] otherwise — [i.e.? a Term for years be created to commence at C.L. Pow. 48. 10 Co. 78. &c. ...

post. 50. 51.

several The suspension of this right continued for centuries — from the reign of H. 2 to the latter part of that of H. 8: but the restriction was evaded by the doctrine of uses — a devise of the use of land + being enforced in Chy by Ecclesiastics. 2 Bl. 375. Pow. 8. Plow. 414. (Post. 53. & 56.

+ i.e. of ye equitable or beneficial int.)

This practice was checked by the Stat. of Uses 27. H. 8 which transferred the legal Estate to the use, & thus consolidated them. Distinction between them destroyed by this Stat. (See Post 56. 57) 2 Bl. 375. Pow. 613. 5. Co. Litt. 11. n. Pow. 236. Dyer 142 a. 143 b. 1 Roll. 616. — Post. 59. & 152

But by stat. 32 Hen. 8 it was enacted, that all persons, having a sole estate in fee simple or in coparcenary or in common of inheritance in lands &c. sh.d have power to dispose of 2/3 of those holden in Chivalry & the whole of those holden in Socage, by devise +. This Stat. was explained by Stat. 34 Hen. 8. — The first of these is called the Stat. of Wills. Pow. 140-1. 9. 2 Bl. 375. 77. And now all

St. 32. H. 8. — Pow. 42.

+ in writing.

Stat. 12. Car. 2. — all English Tenures, (except copy hold), being converted into Socage, by Stat. 12 Car. 2. all lands, except Copy holds are devisable. Pow 42. 10. 2 Bl 375-77. (see Post, 11.)

Further regulations were made, as to the mode of making devises, by the Stat. of Frauds &c 29 Car. 2. Chap 9 & (of which post.) — These prescribe ye requisites, or solemnities, of ye devising instrument.

Stat. of Conn. & com. includes "lands & other estates," without qualific. (post, 10). and includes trust, est. pur auter vie. — Our Stat. authorizing devises, is similar to the 32 on Hen. 8, except that it extends the privilege farther; (St Con. 42.) — We have also a Stat, similar to the Clause, respecting devises, in the Eng Stat. of Frauds (St Con 257 infra) — Ergo, Constructions given to those Stats. are generally adopted here.

+ (or rather ye requisites of ye devising instrument) — The Power of devising, then, depends, in Eng. on Stat. 32 H. 8. explained by Stat. 34 H. 8 — The mode of devising + is prescribed, in Eng by the Stat. of Frauds. C 9 (29 Car. 2. Pow 11 - 8. 2 Bl 376. 7 Ves. 370.): ~~& in Conn by a distinct stat.~~

In Conn. the power of devising is given by Stat entitled "An Act relating to the age, ability, & capacity of persons". St. C 42. — The ~~mode~~ or solemnities of the instrument prescribed by "An act concerning witnesses to Wills." ~~St C 257~~ St. C. 653.

Title by Devise.

The Instrum.t under St. of H. 8.

— Of the Devising Instrument under the Stat. of H. 8.

A Devise under the Stat. of H. 8, is "an irregular instrument in writing" — i.e. That Stat. having prescribed no form of words, any writing, manifesting an intention to make a testamentary disposition of lands,+ & having the formalities required by law, will amount to a devise; ~~under them~~ provided such intention is not contrary to the established rules of law. (Pow 12. 13. 14. 118. Doug. 377–9. &c. An instrument in the form of a Deed, & tho' actually delivered as such, (1 Atk 248. Finch's R 195. 3 Kebl 310. 1 Mod 117. [see post 12. & post 108.]; provided it purports to dispose of real est.e after maker's (testa's) death. & it is void, I conceive, if it purports to pass ye. prop.y in presenti; tho' deliv.d after the ~~testa's death~~ ye. maker's death. (Belden v. Carter, 4 Day, 66.)

+ (or rather, purporting to be a testam.y disposition of lands).

p. 85.

— ~~provided it purports to dispose of~~

Post, 80.

So a devise (or will) may be written at different times — on different sheets of paper — which need not be joined together. (Pow. 15. 106 &c. 108. 682–3. 1 Show 69. Comb 174.); — & they all constitute but one devise, if so intended. (1 Burr 548. Pow. 15–16.) — Ex. gr. One, by one instrument, devises black acre, to A; — by another, white acre, two years hence. (Pow. 17. & 1 Show 545. 553.); & if duly authenticated, they will ~~together~~; operate together, as ye. testa's devise, or last will.

Post. 23.

In the last example the devisor makes several partial dispositions of several parts of his estate, as he may do. (Pow 17. 18.

Title by Devise.

The instrum.t under the stat. H. 8.

In this case, however, the instruments must not be declared upon, as his "last will" gen.ly: — but particularly so as, that testator made his last will of such a part of his property &c. (Cow 18. 1 Show 544.)

So, also, one may make several or separate dispositions, by devise, of different interests in the same subject. (E.g. Devise of lands to testator's youngest son & his heirs; & afterwards, same lands are devised to testator's wife for life, she paying such a rent to the son.) Both stand, as if made in one instrument. (Cow 18. 19. Co Ep. 721. 1 Vesey 187.) And The last is, in effect, only a revocation pro tanto. (See post 127.) — 1 Prec. 537. 540. 624 627-8. 3P.W. 341.n. Comp. 5th — post 127 n. 155.

So a latter instrument may, on the same principles, modify a devise, made in a former one. E.g. It may diminish the former, or annex conditions to it. (Cow 19. 20. & 2 Atk. 235.) And such subseq. diminution &c. will operate, as a partial, or qualified, revoc.n

So a devise may, ~~~~, by a reference ~~~~ to another instrument (as a deed) make that, for the purpose of explaing. the intention, a part of the devise. E.g. A devise to J.S. all the rents, &c, specified in a certain deed { see p. 12

(turn over)

do

Title by Devise.

Instrum.t under Stat.e of F. & F. + by deed — ch, of a direction by Testator to Exors, to dispose of a certain sum, as he sh:, by deed, appoint; & he makes the appointment. (Pow. 22-3. Nov 117. 2 Atk. 273. 1 P.W. 330 — + Vide Pow. 48—9. (Ruge — —) 2 Vesey jun. 228. — (Post 12-13.

So, after a will, or devise, is made & published, testator may make a codicil, or codicils, explaining, altering, restraining, or enlarging, the disposition before made, (Pow. 24.) — The Law annexes the codicil to the devise, & considers both, as one instrument. (Pow. 23 543. 7 Ves. 242 1 A 187

By a codicil, is meant, an appendage, or supplement, to a Will or devise; explaining &c (ut supra; (Pow. 23-4.) +

+ A codicil supposes a previous will complete in itself, & already executed. post 26-7. 182.

[It seems, then, y.t a codicil, in strictness, always relates, in whole, or at least in part, to y.e same subject-matter, as y.e orig.l instrum.t For a subseq.t disposition of a distinct subj.t seems rather a co-ordinate part of y.e original disposing instrum.t, y.n an appendage to it.]

But a mere recital, in a devise, of something contained in another instrument, is not itself a devise. (2 Cruise 26-7. Shea 427 Com. 232.

In the construction of the Stat. of Frauds it was holden that every devise of lands &c must be actually in writing (Pow. 25. Plow. 345.) But the Judges took the word, "writing," in its most extensive & vague sense; as including loose notes, memoranda, & even letters, expressing owner's intention. (Pow. 25-6. 2 Bl. 376. Mo. 177 Sy. 72. Pre Ch. 100. (— Post, 16.

The Instrum.t under y.e St. 4. 8.

Title by Devise.

Indeed it was holden at first, unnecessary that the writing sh.d be made, or ratified by y.e Devisor. — A devise, written by an Attorney, in pursuance of instructions by devisor, in his absence, & not even read to him, was holden good. (Pow. 26. Dy. 72.

By parol, it was holden, that if one in extremis had declared his intent to devise, & another, without any direction or authority, had reduced it to writing, in the former's life-time, it w.d be a good devise. (Pow. 26. 1 Leon. 79 3 Lev. 113.

But these two last opinions were soon overruled. (Pow. 26-8. Cro. El. 100. Dy. 72 2 Keble 345. 1 Leon. 113

And it was holden, that the Devise must be completely reduced + to writing, during devisor's life; & hence, where [e.g. if a devise was to be made to A. & his heirs upon condition, & before the condition was written, devisor died; it was all void.] Pow. 28-9. Dyer 72. 3 Co. 31 b. 1 Rolle 72

+ by his direction.

Title by Devise.

The Instrumt. under ye St. of 4. 5.

But when devisor directed several distinct dispositions, & after one was completed, but before the others were written, died; the former was adjudged good. (Pow. 29 36. 31.

So it was holden, that a devise might be good in part, & void in part. - e.g. Scrivener annexed a condition to the devise, without authority - Condition void - devise good -. (Pow. 30. & 72. n 2.) - Contra, where the direction was to write a devise on condition, & the devise was written, without condition. (Pow. 30. (Keb 550. Lev 356) - Where the devise, intended, + is not written, in testator's life time.

+ (or yt. testator's intention),

Signing by devisor was holden unnecessary under this Stat. - (not necessary, that his name shd. appear on the instrument). Pow. 30. 1. 1 Sid. 362. 1 Lev. 35. 3 Ks. 77.

Indeed it was holden, that any writing tho' neither signed nor sealed, + ~~nor written by him~~, was sufficient; & that the evidence of one witness was sufficient to establish it. (Pow. 31 &c. 2 Keble 128. 1 Sid. 315.

+ & tho' it were ye hand-writing of a third person,

A decision to this effect probably occasioned the clause, relating to devises, in the Stat. of Frauds &c. (Post. 11. 12 - wh. prescribes further requisites.

Post, 49 & ult. Of Interests & Estates, not devisable

Formerly holden, that contingent interests, resting merely in possibility, c[ould] not be devised under the stat. of Wills. (Pow. 34. 3 Leo. 17. Fearne 291.) Ex. a conting[t] rem[r].

Now clearly settled, that they may be— i.e. possibilities, coupled with an interest, are devisable before the interest vests.+ — Secus, of naked possibilities. 1 Pow 34 234 497. 600. 1 Bl. R. 222. 1 H. Bl. 30. 1 Fonbla. 203 209. Fearne 441–4. 3 T. R. 88. 90. 4 T. R. 248. (Post, 57–2. Ex. in Pow. 5 T. R. 2.) — i.e. contingencies, not coupled w[t] an int[t]. Ex. A bare autho[y] (depend[g] on contingency), over y[e] estate of another. — post, 57.

+ viz. conting[t] rem[r] & ex.y dev[s]. Ex. Devise to A. in fee; but if he dies before his age of 21, to B. in fee. — B. may devise his conting[t] int[t], w[h] will take effect, if A. dies before full age.

But an estate which is turned to a mere right, is not within the purview of the Stat. of Hen. 8. — (as a reversion discontinued) 35, 45. E.g. [Tenant in tail & the reversioner join in a lease for life. — Reversioner cannot devise the revers[n]. — It is discontinued] (Pow 35–6 611. Co Car 281. 293 or 387. 405. — Vid. 2 Bl. 198–9. (Page, 50–1.–151.) — Ex. Land, of w[h] y[e] owner is disseised. (Post, 45–6.

Estates pur auter vie are not devisable under Stat. of H. 8: — For the stat. is confined to persons, having land &c. in fee simple. (Pow. 36 7. 38. 418 6. Roll. 334. Cro 82. 58. Co Litt. 41.) 2 Roll. 150. Salm. 32. — Post, 50.
So of an estate for several lives. (Pow. 37. 3 Keb 450. 1 Lisa. 428): And for the same reason

Title by Devises.

Interests not devisable.

Est. of a ~~[illegible]~~ freehold, descendible pur auter vie. E.g. Tenant in tail grants to A. & his heirs+ – A. cannot devise his interest. (Pow. 36. Carter 208. 311. Rept 91–2. Dyer 253.

+ for ye life of ye tenant.

But now, by Stat. 29 Car. 2 estates pur auter vie are devisable, ~~[illegible]~~ – unless there is a special occupant; i.e. unless it is limited to the heirs &c. of the ~~[illegible]~~ tenant.* 2 Bla. 259. Pow. 37–8. 39–40.

* see 2 Bl. 259. in note, that they are devisable, tho' there is a special occupt.

~~*(Decisions to ye ... & ...)~~

The Stat., it seems, authorises devises of estates pur auter vie – The words are "shall have power &c to make their wills &c "of their lands & other estates" – which seem to include all estates, which may continue after the owner's death, & to which no other person has a claim, which he (the owner) cd not defeat by his own act – It does not then include estates in tail. (See second section of the statute, p. 43.) Post. 50.

(+St. C. 42) [illegible]

+

Indeed by the 2d section of the Stat. it seems, that one may devise any interest, continuing after his death, which he might have transferred, by deed in his life time – ~~[illegible]~~ Stat. Com. 43.

Dignities, Offices, & Franchises, tho' they may in England be descendible, ~~[illegible]~~ are not devisable, they are not within the Stat. of H. 8.+ (Pow. 40–1. 3 Co. 32 b. 10 Co. 81. In Conn. all Offices are strictly personal,

+ Ex. a peerage.

and

Interests, not devisable

Title by Devise.

xcept, that in some cases they may be exercised by Deputy. – Not devisable, nor descendible, in any case.

* In our law they are unknown – Post 14.

Copy-hold Estates are not directly devisable in Engd.* ~~[illegible]~~) + Not within the Stat. H. 8. (1 Pow. 10. 45-6 (Wood's Ins. 155. – (~~supra~~ ante, 2, 3) But they may be surrendered to the use of the tenant's will; & will, then pass, by the surrender, to ye uses named in ye will. (Pow. 45-5.)

+ of an estate.

A future right of re-entry on lands, depending on the non-performance of a condition by grantee, + is not devisable. – For the grantor has not the land, till breach of the condition: ~~[illegible]~~ – (Pow. 46. 185. 1 Vesey. 223 – 427. ~~[illegible]~~ (Post, 45-05-57.): and the benefit of the condn. is personal in the grantor & his heirs. (2 Bla. 155-5. – Pow. 45.): So ye. a devisee by such, cannot take adv. of it. (See Ests. on Condn. p.

Of the Devise itself (i.e. ye Instrument) & of the subject matter of Devises, within the Eng. Stat. of Frauds & our own St. p. 57.

The clause, relating to this subject, in the Eng. Stat. of Frauds, enacts "That all devises of land &c shall be (1) in writing; (2) signed "by the party devising, or by some other person "in his presence, & by his express direction; (3) attested & "subscribed, in his presence, by three or more "credible Witnesses. (Pow. 117-8. 2 Bl. 376. A similar enactmt. in substance, exists, I conclude, in the several states of this Union.

Ira.

Title by Devise.

Statute 4. & 5. Ann. c. 29. sec. 2.

* Our Stat. enacts that "no will, or codicil, "wherein there shall be any devise of real "estate, shall be held good, if it be "not witnessed, by three witnesses; all of "them subscribing in the presence of the testator." (Stat. 2. 653.)

+ & that ye. word, "writing," is not expressed in ye. act.

* Substantially the same with the Eng. except that there is no express provision made, with respect to testator's signing.+ — Same rule, however, is adopted by our courts, as to testator's writing+ signing. (Swift, 10. — Devises were in use here, before ye. stat. was made — & doubtless, signed, as in Eng. Writing & signing appear to have been assumed, as pre-existing requisites.

The object of these provisions, is to secure men, in extremis, agt. fraud, & to protect heirs at law. Pow. 47.

The Instrument.

"All leases &c. — No form being prescribed (any more than in the Stat. of H. 8). any writing, which wd. have been good, as a devise under the Stat. of H. 8, will now be valid, if the solemnities, required, by this last enactmt. (Stat. of Frauds), are observed: i.e. if signed & witnessed as the latter Stat. requires. Pow. 48-9. Swift, 4.

post Hence (as under the Stat. H. 8.) a devise, executed according to the Stat., may, by reference to another instrument, make the latter, a part of itself — tho' the instrument referred

Under stat. 29 Car. 2

Title by Devise.

referred to, is not thus executed — E.g. A. by devise, duly executed under this stat. charges his land with his legacies; & then by another instrument, not thus executed, gives legacies — these legacies will charge the land. (Pow. 19. 48 &c. 1 Atk. 368. 1 P. Wms 423. 2 Atk. 274. 3 Burr. 1775.) (Vid. Ante, 5. Post, 15)

"Of any lands or tenements": — Description of the subject-matter, upon which the enacting part is to operate. (Pow 52) —

[The words in our stat. "Lands & other estates. (H. L. 42) 23) — [& "real estate" (— — — —) H. 683.]

The interest, made devisable, by ye Engl. enactments, is designated, by ye stat. of H. 8. viz. a fee simple.

Decided that the stat. does not extend to such Engl. Colonies, as were planted before the stat. passed. — Semb. as to those settled afterwards. — (Pow. 52. 2 P. Wms 75. Comp. 204. Sal 411. — (~~Vid. "Municipal Law. 4.12. Expt.~~) 1 Bla. 105. 108. 1 Ld. Ray. Treat. 350. 4. 390 — 3 2, ? — 75. Kirb. 359. — (Vid. Municipal Law 12.)

—

But a devise, made in a foreign country, of lands, lying here, must be executed according to our stat. (Pow 52 - 3. 2 P. Wms 291.) The subject ~~[illegible]~~ in such a devise (~~[illegible]~~) ye lex rei sita, must govern ye disp. of it.

~~Either ... as to ye disposition of personal chattels, the law of ye testa's domicil governs.~~

Title by Devise.

Under y^e stat. 32. Hen. 8.

(See Executors, &c.)

Devises, in ca. of bills &c. ~~[illegible]~~ of personal chattels, ~~(goods)~~ such prop^y has, in law, no locality. (1 H. Bl. 690. 1. Ambler 25. 415); & is, then, regulated by the law of the owner's domicil.

• The above cited words from y^e stat. do not extend to copyhold lands. (Pow. 53. 10. 45. 6. Cro. Car 44. 2 Bl. 1114. 2 Vern. 498. These are, then, not devisable. Ante, 11. Pt. 175.

These words do not extend to a bequest of a chattel interest. (Pow 55. Gilb. K. E. 169. 170. Bequests of this kind remain, in gen^l, as at com. law; i.e. it is by provisions of ye com. law y^t they are ~~[illegible]~~ bequeathable.

A trust of inheritance is within the stat; & cannot be devised, but by an instrum^t made according to it. (Pow. 54. 3 Atk^s. 152. 2 P. Wm. 258.) Ex. Dev^e by A, of lands, holden in trust for him, by B. so is an eq^y of red^n on a mortg^e in fee.

An appointment of land, under a power, if made by will, must be executed accord^g to the Stat. ~~[illegible]~~. E.g. An estate is conveyed to trustees, to such uses^+, as A. shall, by will, appoint. (Pow. 48-9. 58. 150. 1 P. Wms. 740. 2 P. Wms. 258. 2 Ves. 179 — (Pow. 42.

+ (or in trust for such persons),

By "will," is meant such a will, as is proper for disposing of land. ~~[illegible]~~ ~~[illegible]~~ ~~the same~~ — (Post, 42. 50.) The instrument, in y^e case, directing uses, or trusts, is not called a will, or dev^e (tho' of a testamy nature); but an appointm^t.

• General Rule, that a writing importing to be a will, if void, as such,^‡ cannot operate as an appointment — becaus, the mischiefs, intended to be

‡ for want of y^e prescribed requisites,

Title by Devise.

Under yᵉ stat. 29. Car. 2.

be prevented by the Stat. w.ᵈ ensue. (Pow. 58-9. 2 Vern. 597.) – It being as important to guard agᵗ fraud &c. in the one case, as in yᵉ other.

And if a legacy is given originally out of land, the will, creating the Charge, must be executed according to the Stat. – Such a Charge is, in effect, a disposition of part of the land, by devise. (Pow. 59. 2 Atks. 268. 285. [Different from the case of a ~~Debt~~ legacy referred to, in a devise (Pa. 13.) – In yᵗ case yᵉ charge is created by the devise.] Ex. I bequeath to J.S. such a sum of money, to be raised by yᵉ sale of my land.

Rents, arising out of land, are within the purview of yᵉ Stat. (Pow. 59.) – For they partake of nature of land, & follow it, as the incident does its principal. Ex. A fee-simple rent.

So a will, giving a power to Exᵉᵒʳˢ, to sell lands, must be executed according to the Stat. (Pow. 59. 2 Vesey. 179.) – For this is indirectly disposing of land. i.e. enabling others to do it.

The Engᵗ Stat. of Frauds extends, in terms, to all lands & tenements devisable either by the Stat of Wills, – or by itself, (the 2ᵈ of Frᵈˢ) – or, by any custom. (3 Powᵗ 59. 60.

Examine Lect. 2.

Title by Devise.

Of the Solemnities required in Devises by the Eng. Stat. & our own.

Requisites (writing)

First: The devise must be in writing. — This requisite, indeed, ~~obtained~~ existed under the Stat. of Wills — Pow. 60-25-6. Plow 345. (Pa. 5.) — It is also necessary under our Stat. — tho' the word, "writing," is not used. Ib. ~~43.557~~ 42.553 (Sw. 326) — But the provision as to Witnesses, implies that it must be written.

+ ... signing

This rule needs no illustration further than has been already given respecting ~~as~~ the instrument ~~...~~ under ye. stat. of wills. — Ante, 4-5.

~~Sealing, tho' usual, is not necessary (Cooper 254) — Eng. Stat. does not require it.~~

Signing.

Secondly: "Signed" by testator, "or by some "other person, in his presence, & by his express "direction." (Pow. 47-8. 60.

Signing, not expressly required by our stat. (Ib. (42.553)) But in the Construct. of our stat., ye. rule of the Eng. Stat., as to signing, is pursued. + (...) (Sw. 326. p. 12

+ Our stat. assumes writing & signing to be pre-existing requisites.

— Hence, our law under this head, is the same as the Engh.

Our new stat. in Con.t requires signing.

Title by Devise.

Requisites (signing)

Sealing is usual; ~~[illegible]~~ ; but not necessary either here, or in Eng.d — Sealing, in case of deeds (is a feudal solemnity originally a mark of distinction between families. (Pow. 61. 76. Gilb. R. E. 261. 1 Sa. 326. Comp. 254) But the stat.s relating to devises, do not, prescribe it.

Signing what? It has been holden that sealing alone, amounts to signing within the stat. (Pow. 62. 3 Lev. 1. 3 Mod. 219.) — Ct divided 3 to 1 — Same point holden by Ld Raymond (2 Stra. 764. Pow. 66-7. — Holt ~~[illegible]~~

Wes. Jun. 13.15 { Contra, ~~[illegible]~~ (Pow. 67. 74. 1 Wils 313 — The latter ~~seems~~ is the better opinion. — The former facilitates the forging of Devises: And as yr law is now understood, sealing is not suff.t 17 Ves Jr 459.

But the name of the Testator, written by himself, in any part of the instrument, is construed a signing, unless it appears that it was not so intended. Ex.d, A.B. in a will [illegible] (Pow 61-6. 3 Lev. 1. 3 Mod. 219. 1 Eq. Ca. ab. 403. ("Contracts" 95. [illegible]) — (Pr.t 155. 18 Ves J. 183) This is, prima facie, a suff.t signing.

(Our new stat. requires testat's name to be subscribed.)

But if it appears, that the name written in the body of the instrument, was not intended as a signing yet will not operate as such. — as, if there was an express intention to sign, formally, & this intent was defeated.

Title by Devise.

Requisites. Signing.

defeated — E.g. The devise being in 5 sheets, testator signed the two first, & attempted to sign the others, but failed. Doug. 241 or 229. Pow 65-6. 1 Fonb. 180) — The Ct. held, that there was no suff.t signing within ye stat.

The onus probandi, in these cases, lies upon him, who opposes the devise. The presumption of law, (the intent to devise being certain), is, that the name, written, ut supra, in the body of the instrument, was intended to be a signing. (Pow 65-6.

Devise subscribed by 3 witnesses, & declared by testator in their presence, to be his will, tho' not signed by him — holden well executed (1754) 1 Ves. Jun.r 11.) Quaere. — Was not the testator's name, written by himself in the body of the instrument? If not, how can it be law?

Attestation, &c.

3. "Attested & subscribed, in his presence, by 3 or more credible witnesses." — The gen.l object of the Clause is, to prevent the frauds, consequent upon the secret execution of devises. (Pow 66. — ("Credible" (1 Burr 417. Pow 113.116 Cost. — These are designed, as guards to testa. ag.t fraud, or imposition.

Title by Devises.

Requisites. (Attestation &c.)

The attesting witnesses are to attend, chiefly, to three objects: 1. The sanity of testator. (Pow. 68.) 2. The fact of his signing. (Id. 69. 77.) 3. The fact of publication. (Id. 80.)

1st They are to judge of his sanity, or state of mind. (For the signing which they are to attest, includes in law, not only the physical act of writing testator's name, but also the mental power or capacity of making a legal & effectual signature.) — An Ideot may write his name, (Pow. 69 pa. 71. 3 P. Wms. 93. 8 Viner 169. 13.); tho' he cannot make a legal, valid signature.

And when the devise is offered for probate, testator's sanity must be proved — onus on devisee — proving the execution to have been formal, not sufficient. (Pow. 69. 70. 2 Atk. 56. Bull. 264. Lib. Rep. 3. 15. — Attor. of Dues.)

Hence the Ct. of Chy will not establish a devise, unless all the attesting witnesses are examined: For the heir has a right to require proof of testator's sanity, from each of them. (Pow. 70. 3 P. Wms. 93. — (Post. 195. 28.) otherwise giving it in evidence at law — See post. 185. 191.

Title of Devise.

Requisites Attestation.

But the testimony of the subscribing witnesses is not Conclusive, as to testator's sanity or signing, or even as to their own subscription. (Bull 264. Stra 1096. Post) ~~P. L. 311~~ No. 23 & 2 Post, 192.)
They may be contradicted, on either of these points, by other witnesses & on either side

2.d They are to attest the fact of testator's signing: — Not necessary, however, that the Witnesses sh.d have actually seen testat.r sign — An acknowlegment, by him, to them, that his name, appearing upon the instrument, was written by himself, is suff.t × as to this point. (Pow W. 77. 78. 3 Lev. 1. Pre Ch. 184. 2 P. Wm 506. 2 Vesey 455. 3 P Wm 253. Doug 232. or 244 note — see post, 173.

× as in y.e ca. of deeds.

But testator's saying "This is my will" is not suff.t evidence of the fact of signing. Semb. It is not an acknowlegment of that fact. (Pow 73 & 2 Atk.s 182.

It seems, however, according to some opinions, that a written declaration, in the hand writing of the devisor, that his name was written by himself, is suff.t evidence to a jury of the fact of signing — an

Title by Devise.

Requisites (Attestation &c.)

— ~~an~~ ~~implied~~ ~~acknowlegement~~. (Pow 76-78. Skinner 227. Com. R. 197. E.g. "signed &c. as my last will" &c. — Sed Quaere: whether an actual acknowlegement is not necessary. (Pow. 80. 3 P. Wms. 254.) — How can y^e written declar.^n be ~~an~~ better evid.^e y^n y^e signature itself.

(of public.^n)

3.^d They are to attest the publication: —

As publication was necessary before the St. of F.^s & is not taken away by it, it is still holden necessary. (Pow 80-1. 3 Atk. 156.) — Analogous to the ceremony of delivering a Deed. (Pow. 86-7.

— By the publication of a will is meant either some declar.^n by testa.^r, or some act of ~~testator~~ his, amounting to a tacit declaration that the instrument is his will. (Pow 81. No particular form of publication ~~necessary. It~~ is prescribed. (Ib.

7 Taunt. 355. —

Any act, or declaration, importing a solemn intent in testator, to dispose of his estate by the instrument, is sufficient. (Pow 81. 8 Viner 125.

Tenu

Title by Devise

Requisites. (Attestⁿ of Publicⁿ)

Hence, delivering the instrument, as a deed, has been holden a suffᵗ publication. (Pow. 81. 8 Viner 135.13.) — So holden, even when the Witnesses were deceived, & supposed the instrument to be a Deed. (Pow. 81-2 4 Burns Ec Law 117.

So declaring to the witnesses "This is my last will," is suffᵗ (Pow. 82. Swinb 52

So, publication may be inferred; e.g. when the form of the attestation was in the testator's hand writing, & in these words:— "Signed, sealed, published, & declared &c in presence of us." He sᵈ to them: "Take notice;" — it was holden a sufficient publicⁿ (Pow. 82-6. 4 Burn Ec L. 114.

But the publication must be in the presence of 3 witnesses (Semb.) — at least this is holden necessary as to re-publicⁿ Pow. 664 Com R. 381. (Post, 173.

Requisites
(Attest.a — of publica

Title by Devise.

Necessary that the whole will be present at the time of attestation. — If it is in several parts, one of which is attested by witnesses, who never saw the others; it is not well executed. (Pow 87. 3 Mod. 263. 1 Eq Ca. ab. 403. Post, 50.) For yt wh yt witn.s do not see, they cannot attest.

But unless there is positive proof that the whole was not present, the Jury may, from the circumstances of the case, presume that it was all present. It is a question for their consideration. Pow 87-8. 3 Burr. 1773. 1 Bl R. 407. 422. 454.

(Subscription.)

As to the subscription of the witnesses:— Holden, that if a devise is made on three sheets of paper, not joined, & each witness subscribes one sheet, the subscription is sufficient. Pow 89. 90. 101. 108. 682. 3 Burr 1775. 2 Bl 377. 1 Burr. 548. Freem. 486. Pre Chy 185. 270. Carth. 37. 3 Mod 263. (Post, 27. —) ante 5.

So, if the loose sheets, in the last case, were wrapped up in a blank cover, their subscription upon that, it is said, will be suffic.t (Pow 90. 682-3.) — Qu. Would not such a rule lead to uncertainty & imposition, as to the identity of the will?

Title by Devise.

Requisites.
(Subscription of witnesses.)

"In the presence of the testator": — These words are holden synonymous with ye words "within ye view" &c. — If they subscribe within his view, the subscription is suffict. (Pow 90 &c. 2 Bl. 377.) By the ~~letter~~ word, "view," is meant possible view. So that, if testator+ might have seen the witnesses subscribe, the subscription is in his presence. (Pow 90 &c. Sal. 395. 688 Carth 81. 1 Eq. ca. ab. 403. &c.) E.G. where he might have seen into a gallery thro' a glass door.

+ was in a situation, in wch he ~~might have~~

This provn is designed to prevent not only fraud, but any mistake, as to ye identity of ye instrumt. (2 Bl. 377. Doug. 232. Pow. 98. 2 Car. & Payne. 458 —

So, if the curtains of his bed are closed; yet a subscription in the same room, it is said, is sufficient (Powell 92 Sal 395.) Because it is in his power to see them.

Not necessary, that testator & witnesses shd be in the same apartmt or house. E.g. She in her carriage,+ they in the ~~Attorney's~~ office. (Pow 92. 1 Bro Chy. 99.

+ before an atto's office-door, &c.

Bed.

Title by Devise.

Requisites. (Subscription of witnesses.)

But the subscription, tho' in a contiguous apartment, is not good unless testator might have seen it. Pow 92–4. Carth 79. Comb. 156. 1 Show 89. Holt. 222. 1 P Wms 239.

Tho' the witnesses retire (to subscribe) at testator's request, the above rule applies. (Pow 94–5. 2 Show 288) [~~For this~~ [the ~~presence~~ ~~it being~~ ~~secure~~ ~~is intended to prevent, not only fraud, but any mistake, as to the identity of the instrument.~~ (2 Bl. 377. Pow 98. Doug 232]

But, so, ~~then~~, testator is insensible at the time of attestation, tho' corporally present; the attestation is not good. — The "presence" required, implies, in construction, a mental presence also — a knowlege of the transaction. (Pow 96. Doug 229. or 241.

So, tho' the attestation is in the same room with testator, & he is of disposing mind; yet, if executed clandestinely, it is not suff. — It is not in his presence, within the meaning of

Title by Devise.

Requisites. (Subscription of witnesses.)

of the Stat: ^[For his] ignorance of the transaction. (Pow 95. 10 Mod 740.

Tho' the witnesses must subscribe in testator's presence; yet the fact, that the subscription was in his presence, need not appear on the face of the instrument. It is a fact for the consideration of the jury: And if ~~it is not the~~ stated in the instrument, it must, still,^× ~~be proved~~ ×. (Pow. 98–9. Com 531. Bulk 264. Stra 1109. 8 Viner 128.) — . — . — ~~&c~~ — If the witnesses are dead ≠ jury may presume the fact, on proof of their subscription

+ be established, by direct, or presumptive evi

≠ at y. time of trial;

"By three or more" credible witnesses :— Under these words it has been decided that if a devise is subscribed by A. & B. & afterwards a Codicil by B. & C., that devise is not^+ ~~signed~~ by 3 witnesses, within the Stat. (Pow 100. 110. 680–2. Carth 35. 1 Cl Holt. 742. 1 Cl Comb. 174. 3 Mod 262. 1 Show 68. Prec Chy. 270) — & that if the devise is not witnessed ≠ a Codicil with 3 witnesses will not make it good. (2 Vern 597. Pow 682. 680. — Ante, 6.

+ subscribed

≠ or not duly witnessed,

Title by Devise.

Requisites.

Subscription of witnesses. — ~~Qu. as to the principle~~: It does not appear except in one of ye cases (Com R 384 Pow 104–5) that the devise was present, when the Codicil was executed (Vid. ante, 23.). The decisions, however, appear clearly to have proceeded upon the distinction between a devise & Codicil, on ye one hand, & a devise made at several times, & in several distinct parts on ye other (Pow 108–9. 686. 1 Burr 554–5. ~~R L 350~~): In which last case an attestation of one part, + (the rest being present), is sufficient (~~R~~ Ante, 23.) ~~What is the difference? (R L 306.) for the will & Codicil constitute but one instrument.~~ (~~... 543~~) Reason of ye difference: A Codicil ~~...~~ is considered as ~~being~~ intended only to affect an instrument already completed; not to consummate the orig. instrument, or to give it validity. — Attestation of the Codicil ergo, is not effectual as to the original devise. (Pow 68). 2. Prec Ch 270. 2 Vern 597.) — But an attestation of one part of the original devise is intended to give authenticity to the whole; (Post. 150.); & if ye part is subscribed, by three wits ~~ye attest. is suff.~~ (all ye parts being present); ye attesta is suff. Post. 150.

But where there is a will & codicil on one piece of paper, ye question, whether the subscription of the witnesses + (at ye foot of ye codicil) belongs to one or both, is a matter of fact, to be determined by the jury. (Pow 106. 1 Com. 197

Title 14. Devise.

Requisites. (Attest^a of witnesses.)

And as to the question, whether a subseq^t testamentary writing is a codicil, or a distinct part of the original devise — it seems, that if the subsequent ~~part~~ writing relates to personalty only, tis executed according to the Stat.; this circumstance furnishes presumptive evidence, that it was not intended as a Codicil. (Pow. 109. 1 Burr. 554-5.) For y^e stat. requisites ~~~~ are unnecessary to ~~~~ a disposition of person^l prop^ty: and of course, it is fair to presume, that ~~they~~ y^e witnesses were intended to authenticate y^e orig^l will.

Not necessary in law, that the witnesses subscribe in each others' presence, or at the same time. (Pow 110-3. 2 Cha. cas 109. 3 Burr 1775. 2 Vern 429. Prec. Chy. 184. 2 Atk 177.) For the terms of the stat. do not require it.

(+ i.e. in action at law,)

But it is not safe: for the oath of one witness is sufficient+ to prove, that all signed in testator's presence; (Post, 191.) but unless all were present together, proof cannot be thus made. ~~~~. 3 Lev 264. Cow 735. 1 Ripon 741. 1 Dougl 184. 1 Burr 365. 4 Burr 2224.) — Also, if one is living, the hand writing of the others cannot be proved+; (Post, 196 — vid Pow 709.) In such case, proof that the others signed in testator's presence cannot be made, ~~by y^e oath of one~~ #, unless all were together. (Pow 113. 72 a.)

(+ It not ~~being~~ being y^e best ev^e.)

(# nor perhaps, expressly proved at all,)

[Note the difference between proving the execution & attestation of the devise in a particular suit at law, which ~~~~ may be done by one witness (Cow. 735. 1 Ripon 741.) — & the establishment, or formal probate of it, in Chy, for which purpose all must be examined — Pow 70. 718. 1 Wils. 216. 1 Vesey 177. ~~~~. (In Conn. the practice is ~~~~ to call but one to prove it.) ~~~~] Post, 191. Ante 19. Post 135 Post, 196.

Title by Devise.

Requisites.
(Attestation by witnesses.)

(Credible.)
* The word, credible is not in our stat.
+(to testify)

"Credible* Witnesses": (~~"Credible" not in our~~)
1st. Who are such? – The word "Credible" seems to be unmeaning. – ~~The credibility of the witnesses is ...~~
If it means competent+, it is unnecessary; for competency is implied in the word "witness" 1 Burr 417–8. Pow 133.
If it means, "entitled to credit," it seems nugatory. For ye credibility of the witnesses is no part of the essence of the devise, nor at all necessary to its validity. – Their credibility is never a subject of inquiry, except to ascertain how far their testimony is entitled to belief. (1 Bur. 417): And if their own oaths are not believed, upon their own credit; corroborating ev.+

+ I presume, may, still under their attest. of fictual.

Decided that a devisee is not such a witness, as the stat. requires – clearly not such as to his own devise+. For, one who is not witness cannot be a credible Witness, Cow 114.–116 Holm vs Jennings, Com. R. 91. Carth. 514. 3 Ld Ray. 505. 12 Mod. 277. 1 Freem. 510.) – ~~...~~ Stra. 1253.
— The rule excludes interested Witnesses genlly
~~...~~
on ye stat.
~~For ye Eng. stat. 25 Geo. 2. ... see Cr. 136.~~

+ Being directly interested in the event.

So, doubtless, persons rendered incompetent to testify, by crimes+, cannot give evidence of their subscription (Pow 16. 136. 4 Burns Ecc Law. 93.) As where before

+ are not competent to attest a devise. For they

Title by Devise.

Requisites. (witnesses credible)

, before attestation one of the subscribing witnesses was convicted of larceny, or any species of ye crimen falsi.

2d Can a subscribing witness who is [illegible] devisee or otherwise interested at the time of attestation be rendered competent by any thing ex post facto, (as by release) so as to establish ye devise? — In other words, if the witness tho' interested at the time of attestation, is competent to testify at the time of examination; can the devise be established? Pow 113. — Is it well attested?

× (i.e. uninterested);

Holden, [illegible], by [illegible] in Anstey vs Dowsing that the witnesses must be compett. × at the time of attestation. (Stra. 1253. Pow 116 119.) — the witnesses were had an annuity charged on ye land & not released — interest subsisting — So, in Hilliard vs Jennings. This case was carried to the Exchequer Chamber; difference of opinion; & compromised.) (1st Pow. 120. (1 Ves. 503.

+ (the witness's intt. being extinguished, at ye time of trial).

[illegible] was strictly decided in favor of a devise under such circumstances, + in Wyndham vs. Chetwynd (Burr 414. 1st Cow 124) The witnesses were all creditors: the debts charged on ye land but paid before the time of exam:

Title by Devise.

Requisites (witnesses credible)

examination — Devise holden duly attested.

Same opinion manifested by Ld. Hardw. in Price vs Lloyd. (1 Ves. 503. 2 Vesey. 374. Pow 120.

Case of Ld. Aylesbury's will in point to the same purpose, cited (Burr. 427–8. Pow 135–6. The witnesses all had legacies charged on land by 2 wills. Indifferent to them, at testator's death (not before) which was established — ~~Previous line~~. — post, 34.

Same point decided in Hindson vs Kersey Pow 130. Pratt C. Justice, contra — See Sp. of Pratt's argument (1 Fon, 41.

~~Powell's statement of the Authorities Page 133.~~

Wadsworth vs Canfield (in Conn.), decided in favor of the devise by Supr. Ct. — reversed by Ct. of Errors 1799.

The weight of Engl. authority is that the competency of the witness is restored by the release — See Powell's statement of the opinions Pow Dev 133 — [Introduction of actions maliciously [illegible] 33.]

Requisites.
(writing — by — credible.)

Title by Devise.

3.° It is questionable, indeed, by y^e^ autho., whether y^e^ Devise to the witness is not void ab initio; so that he may'nt testify as to the others without a release. (1 Burr 1128. 1 P. Wms. 557-8. Carth 514.) — Not positively settled — (Sua. 1253.
Decided contra in Wadsworth vs Camp, C^t^ of E. 1799. Sup. C^t^ of Errors, in Con.

(Introduce § # infra)

See Ev.^e^ 136-7.

The Stat. 25 Geo 2 being declaratory, is an authority in support of the opinion, that the devise to a witness, in such case, is ab initio void, & therefore; that he is a competent witness + (Cow 122.) — That it is declaratory vid. Pow. 129. 133. & Sa. 516 — [But see Pow. 133-4. where he attempts to shew, from the authority of the stat. as a declaratory act, that a devisee, incompetent ± at the time of attestation, cannot become competent by a release — because the stat. declares, that he is not incompetent, at y^e^ time of attestation: & rather, that a devisee is not competent, ± even after a release (for that is the point he is discussing) because he is competent, without it!]

+ without a release.

+ (i.e. interested)

± under y^e^ stat. of frauds,

The Stat. 25 Geo. 2. provides that devises & legacies to attesting witnesses shall be void, & they admitted to testify +; & that Creditors, whose debts are charged on testator's lands, & who are subscribing witnesses, shall be admitted as witnesses ‡ ~~admitted to ...~~. Pow. 122-3.
~~...~~.

+ so as to support y^e^ other dispositions.

‡ to y^e^ execution of the will such charge notwithstanding

By stat. of Con.^t^ (of 1807), dev.^e^ or legacy to a subscribing w.^s^ is void (unless otherwise sufficiently attested, as by 3 other w.^ss^) — & he competent to testify in support of y^e^ instrum.^t^ — provided y^e^ dev.^ee^ &c. who is a subscribing w.^s^, is not an heir at law to testa.^r^ If he is an heir, whole will void. — Stat. limited to wills &c. dated after 1.^st^ of Jan.^y^ 1808. St. C. 683.

Title by Devise.

Requisites

(witnesses – credibility)

(Introduce these ≠ objections at the Com. ante, p. 31.)

≠ As to the second question ante, p. 30:– It is a General Principle of Com. Law, that a release by an interested witness, restores him to competency. (Pow 121. Doug. 134. Ld Raym. 730.–) Obj. – Temptation to fraud at the time of attestation. – What then? – Same objection in every case at C. L. – Stat. of Frs. is intended to ~~regulate~~ prescribe only rules of evidence, in Ct.

≠ Obj. Practice furnishes bribes – (So in every case.)

≠ Obj. with Ideots – lunatics – ~~infants~~ – (They cd not judge of the execution – Suppose same case at Com. law.

≠ Obj. Supp. "Three Englishmen" required – (1. Qualification is intelligible, as referring to attestation. But "Competent witnesses" is not.)

≠ 2. If competency relates to ye time of attestation; then competent witness means only competent qua witness – one of capacity to judge of ~~[illegible]~~ at ye time of the instrument – not a competent, or disinterested wo at ye time of testifying: But ye is absurd.

But a legatee (or devisee) is a good witness against the will: for this is against his interest. Pow. 185. Sal 691.

"Evidence, p. 117. – & see Opinion on ye point, to Mr. Livsly.

An Exor, having no beneficial interest under the devise, is a good witness to prove testator's sanity. (Doug 134. Esp. 489. Gilb. Ev. 120. 1 Mon. 107): As, in question between devisee & heir at law. Aliter, if exor is himself party to ye suit. (1 P. W. 289. 2 Ven. 699. 2 Ves. 42. Stra. 34. 5 T. R. 372. 2 East, 183. Esp. D. 183. 12 East, 250.

Title by Devise.

Requisites.

witnesses.

So, a legatee, who is a subscribing witness, is competent, if it is indifferent to him, whether the will stands or not. E. G. If he has the same legacy by 2 wills, to one of which he is a witness. (Pow. 135. 1 Burr 427. — Ant. 31.

It seems that a testamentary disposit^n of real & personal prop^ty, may be good, as to the latter, tho' void as to the former, for want of due attestation. (Pow 110. Sha. 1255. Cart. 514. 4 Ves. Jr. 200. 319. 327. 332. 337.

Stat (C. 182) on the subject?

Who may devise.

+ real estate, by deed,

The Eng^h Rule is, that all persons, who may convey + & who are not disqualified to devise by Com. law, or by the express words of the Stat. of wills, may devise. (Pow 139.

+ aggregate, or sole,

But by the words "all persons" in the Stat 34 H. 8. are meant natural persons, as distinguished from civil, or bodies corporate. — Corporations + cannot devise under this Stat. (Pow 139. 1 Roll 608. 620. 3 Com. 14.) ~~State~~ A corpor^n aggregate, indeed, never dies. — Ex. of sole corpor^n a bishop. (Bl. 469.

Who may devise.

Title by Devise.

(Disabilities.)

As to natural persons, there are 4 positive disqualifications in the Stat 32 of H. 8. explained by 34 of H. 8. viz: ~~Coverture~~ Infancy, Idiocy - non-sane memory - & coverture. (Pow. 140-2. Dy. 354 B. 1 Vesey 300. - -) - all com. law disabilities.

According to the construction of the Stat. 32 of H. 8. then, those persons, who, before the Stat. cannot convey lands, during their lives, cannot, under the statute, devise them. (Pow. 141) (See first rule supra.) (Post. 45.

~~According to the construction given to our Stat. all persons, who, before the Stat. could devise propy. which was devisable at Com. Law can devise their lands &c. under it. (Pk. 315) - All persons not &c. legally incapable &c. - Sed. Qu. I know of no such rules.~~

Infants.

1st. The devisor, then, must be of full age: Tho', in certain parts of Eng.d infants may devise by Custom. (Pow. 143-4. Ibid. 221.) We have no such custom. - (Post. 181.

Title by Devise.

Who may devise — Disabilities.

• Full age is completed on the day preceding the 21st anniversary of one's birth Sal. 44. 625 Ld Raym 480 1096. Pow 144. 686. 1 Sid. 142. Rly. 84. (Parent & Child, l.) — 1 Keble 589 — ~~Post~~ (Post, 13.

Idiocy.

• 2. An Ideot is one, who has no understanding from his nativity — a natural fool. (1 Bl. 303. — Pow. 144. Dyer 143 b. 203 b — (see Contracts, p.

• A person is not an ideot, if he has "any glimmering" of reason; as if he can tell his age, count 20, &c. (Pow 145. F. NB 233.

A person, deaf, dumb, & blind, it is held, cannot devise — deemed an ideot; as wanting those senses, which furnish the mind with ideas. (Pow 145. 6 Litt 42. 1 Bl 304.
~~Tu. According to some authors of yet intelligence of such persons, they may have words under stood —~~ Sed qu. at y^t time. — They may have suff^t capacity, as proved of late. — Prin. & probable

Non sane memory

3. A person of non-sane memory, tho' not an ideot, cannot devise. (Pow 145-6. Cro Jac 497. Dyer 143 &c.) — By these words is meant insanity, or mental derangem^t in gen^l.

Who may devise.
Disabilities.
(2.) Insane: memory.

Title by Devise.

Not sufficient that testator can remember common events. He must have what is called a disposing memory–i.e. understandg sufficient to make a ~~reasonable~~ rational disposition of his property. (Cow 146. 6 Co. 23. Dyer 72. Mo. 760.

What is a sane & disposing memory is a qu. to be determined by the Rules of the Com Law. Cow 146. 6 Co. 23 B.) — Whether it exists, in a given ca. is a qu. of fact,+ under ye direction of ye court, in point of law.

+ to be determined by ye jury,

Coverture.

4th A Feme Covert cannot devise in Eng.d Her acts are supposed to be done by husband's coercion. She wants free will.* — (Cow 146. 4 Co 61. Hob.t 225. Co Litt. 112 B. Dyer 354. 34. Swinb. 88 — (Vid "Husband & Wife") — ~~Expressly disabled by Stat. of H. 8, Cow. 140-2.~~ Expressly disabled, by ye explanatory stat. 34 H. 8. (Cow. 140-2.

* For ye more particular grounds of her disability, see Husb.d & wife.

And it has been holden, that even a custom ~~for~~ that a feme covert might ~~to~~ devise, was not good, being "unreasonable." — ~~[illegible]~~ (Cow. 147-8 — see 3 Com D. 14.

Title by Devise.

Who may devise. (Disabilities — Coverture.)

Decided in C. that a Feme Covert may devise real property, even to her husband. (Kellogg vs Adams. Ct of Errors 1786) — Sup. Ct. decided contra Kirb 195.) 438.) [Or she may at C. L. devise what is devisable; except so far as the husband's rights wd. be violated by the disposition. (Qu. 2 East. 552.) E. g. Property to her sole & separate use; if not real. (~~[illegible]~~ ~~309. 319~~ — Vesey. 518. 303 2 Vesey. 75. 1 Bro Ch. 16. 3 Atk's. 695. 709. Prec. Ch. 204. 1 Wm. 126. 749. 2 do 8°. 316. "Husband & Wife" No. 8. b. 4.)

It has been since decided in the Ct. of E. that she cannot devise. (2 Day. 153. But by a late Stat. of Cont. (1809), femes covt. are expressly empowered to devise. (2 St. Cont. 15. (Ed. 1813) 130.

[Question: She cannot bequeath personalty without husband's consent. (Perks S. 502. 2 Bl 498. Stra. 891

This rule relates it seems to personal property belonging to the husband by marriage (Bigelow 60) or, which he has a right to control. 2 East. 552. (Requis S. 2 L 111 — "Because it wd. be a Will of his goods" cites Bracton — 1 R. H. C. L. 307. 2 Bl 73 & 111 is explicit to this purpose) — So, of her paraphernalia & c. (Id. 307.) So, according to Comyns, of her paraphernalia. Qu. 1 R 307. 5 Bac 498.

Title by Devise.

Ex[?]. She may appoint an Ex[or] of goods & chattels, which she holds as Ex[x], without his consent. (2 East. 552. — Cannot bequeath them indeed, even with his consent — for they are not devisable. 5 Bac. 498. 2 Bac. 49. Plow. 526. Ibid 340. 1 Roll. 608. 912

There seems, then, to be nothing in the condition of Coverture to prevent a wife from devising what is devisable, provided the rights of the husband are not infringed. Real property is here devisable: & as our stat. does not disqualify femes covert, they stand upon the same footing, respectively, as with respect to property devisable at C. L. [illegible] 319–320. Qu.

But even here, she cannot, by devise, deprive the husband of Curtesy where he is entitled to it. The right of devising being, merely, the power of substituting a devisee for ye heir at law.

[illegible] Judge Reeve's Essay. The reasoning [illegible] of Prac[illegible] approved [illegible] [illegible] [illegible] Fee Tail [illegible] Court in [illegible] Errors 1815 / 2 Day, 163.

Title by Devise.

Who may devise. (Disabilities – Coverture.)

But if husband is banished for life, wife may make a will (or devise I suppose) – for she is as a feme sole, & "may, in all things," act as such. 1 Pow 148-9. 2 Vern. 104 2 Bac 49.

And in Eng.^d there are ways in which a feme Covert may retain, or procure, the same power over the estate real, as well as personal, as is possessed by femes sole – i.e. the power of aliening, or devising. (Pow 149. – (Husb.^d & Wife; 35. 40-1.)

In both ca.^s however, her act is in nature* an appointment – & is not a disposing act. It is merely y.^e ex.^n of a power previously reserved to her, or conferred upon her. It is her legal capacity, to execute a power,# y.^t enables her to dispose of y.^e propy

* of a declar.^n of trust, or

\# over propy, not legally her own),

This may be done by either of two modes of settlement – 1.^st By way of trust,* 2.^d By way of power over a use. Pow 150. 2 Atk. 695. 7 – (Such settlement may be made before, or after marriage. If after, however, it must be by fine or recovery) (Pow 149 (Husband & Wife, 35. 40-1. [illegible]

* created in a settlement.

{ante, 1. Part. 9.

And it seems, that now, a bare agreement* for either of these purposes, will be sufficient, tho' the settlement is not actually made. 2 Atk 695. 6 Bro Par-ca.^s 156. 2 Vesey 191. Pow 166-8. – i.e. the heir will be compelled in Equity to make a conveyance in pursuance of her appointment – & Equity considers as done &c.

* before her marriage, for a settlem.^t,

Title by Devise.

Who may devise. Disabilities – Coverture? Hubb.d Vol. 35-40-1.

1st By way of trust: As if a woman, while sole, having real estate, convey it, before marriage, (or by fine or recovery afterwards), to trustees in trust for herself, for her separate use, during Coverture; & afterwards, in trust for such persons as she shall, by any writing &c. appoint – A devise by her will to be a good declaration of the trust, & to be supported in Equity. It is not called a devise, but a writing in nature of a devise (Pow. 162. 2 Vesey. 612.

2d By way of power over a use: As if a woman, while sole, convey real estate (ut supra) to the use of herself for life, remr. to the use of such persons as she shall by any writing &c. appoint – A devise making the appointment will be supported in Chy. (Pow. 150. 2 T.R. 695. 2 Ves. 64. 612. 3 Bro. Par. Cas. 308. 4 Viner. 168 3 Atks. 707. 2 Eq. Ca. ab. 157. 4. 753. 2. Powell on Powers 50.) – So, now supported in Cts. of law. Semb. (2 T.R. 695. Pow. 162.) i.e. devises under a power over uses; if not so, ~~[illegible]~~, in ca. of trusts: ~~[illegible]~~.) – Uses are now legal estates.

These rules do not interfere with the feme covert's disability to devise. For every power, thus executed, takes effect as if the limitation in the instrument of appointment, had been contained in the original conveyance, or deed, creating the power. The disposition is considered as taking place when the power is created; tho' the nomination of the appointee does not take place till the execution of the power. The deed by of settlement is considered as the deed of alienation, ~~[illegible]~~ or the disposing instrument. (Pow. 103-4. 165 Co. L. 111-112.)

Who may devise

Disabilities - Coverture.

Title by Devise.

The appointment by devise in these cases must be executed according to the Stat. of Frauds - (Pow 48-9. 58. 150 - ~~Page~~ (Antes 14) For it is, virtually, tho' not formally, a disp. of y. propy

- Out of the feme Covert is an infant she cannot thus execute a power over her estate. - Discretion wanted. (Pow 168-9. 3 Atks. 897. 1 Vesey 298. - So, of infants generally. (Pow on Pow. 43 47. 3 Bac 138. n. 1 Vesey 298. 304. Co Litt. 52. 3 Atks. 695. 710. 714. 715. ("Parent & Child," 45. ~~##~~)

Duress.

A devise, obtained by ~~obtained by~~ restraint, Duress or menace of Imprisonment is void ~~are disqualifications~~. These are disqualificns at Com. Law. - not expressly pointed out in Stat. 34 H. 8; tho' implied from the words, at his "free will & pleasure." Pow. 170. Dyer 143 b. Ray. 334. Sty. 427.

- Same rule ~~doubtless~~ in Court. - for ~~freedom of will~~, which is essential in the making of every contract, is wanting. (1 Bl. 136. 5 Co. 119. Pow. 6. 163.

Title by Devise.

Who may devise.

Disabilities – Restraint

So holden that if a sick-man is induced by excessive importunity to make a will, that he may obtain quiet; it is by restraint, & void. (Pow. 170. Hy. 427. 1 Chy. R. 66. — Qu. Com. Dig. "Devise" H.1) — The ca. must, at any rate, be a very strong one. (1 Cox, 354.

But there must be actual proof of undue importunity, or restraint. (Pow. 170–2. 1 Rep. Ch. 125.

Husbd. & wife, 75.

If either of the above disabilities exists at the inception of the devise (i.e. its execution & publication); it will be void, tho' the disability be removed before its consummation by testator's death. For the consummation is founded on the inception, which is void. (ante, 11.) – E.g. Coverture, Infancy &c. Pow. 172–3. Dyer. 143 b. Holt. 246. 11 Mod. 157. Ray. 84. 1 Sidr. 162. Comb. 84. Plow. 343. Sal. 238.

Joint Tenant.

A joint-tenant cannot devise in Engd. This was the rule as to devises by custom, before the Stat. of H. 8. For the survivor claims the whole by a title paramount. He claims by death of his compr. the devisee after the death. – (Per & Post.") Pow 174–5. Lytt. S. 287. Co. Litt. 185. a Cooks S. 500. —) — ~~And there cannot be a joint devise.~~ ~~(Bout. 2 b, 1 ...~~

Title by Devise.

Who may devise. Disabilities – Joint ten.y

(Are not under Stat. of H. 8.) – Not expressly disqualified by these Stats., but tacitly by 34 of Hen. 8, which expressly embraces persons seised in severalty, coparcy & in common – Exclusio unius &c. Pow. 175. 12. 218. 1 Eq. ca. ab 172. 8.

And there cannot be a joint devise. Cowp. 25. 1. – For joint tenants cannot devise at all; since other tenants have not a joint estate. – ~~But qu. cannot joint ten.ts make a joint devise in Con.? there being here no survivorship.~~

+ They are not within y.e stat.

So, if a joint tenant makes a devise of his part, & survives his companion, & dies, it is ~~[illegible]~~ void, ab initio – he had nothing then, + ~~[illegible]~~. Pow. 176. 8. 2 Bl. k. 376. 3 Burr 1488. Cowp. 1. 3 Co. 31. Formerly doubted. Pow 176. 1 Eq. ca. ab. 172. Litt. § 300.

~~+ with [illegible] devise~~
+ (at y.e time of devising) wh. he could devise.

If, however, one joint ten.t having survived his cotenants, then makes a dev.e it is good. For he is then seised in severalty. Pow. 175. 7.

In Conn.t one joint tenant may devise. For there is no survivorship – & words of the Stat. general, & there are no words, implying a disqualification, as there are in the Stat. 32 H. 8. – And there seems to be no legal obj.n to their making a joint dev.e

Who may devise. — Title by Devise.

Impediments — want of seisin.

General Rule:— A man cannot devise lands, which he has not, or is not seised of, at the inception of the devise i.e. the time of its execution & publication. This, indeed is the C. L. rule as applicable to devises by Custom. Pow 183.—198. 2 Bac 51. Co. Litt. 111. Cro. Ez. 401. Pow 191. Sal. 237. Holt. 246. 749. 750. — E.g. Testator devises all his lands, & afterwards purchases more — Latter do not pass — Devise is in nature of a conveyance in presenti, to take effect in futuro[+]. Pow 191. 193.

~~The owner must have a present interest~~ ~~(... 393 ... 330)~~ ~~...~~ (~~Pow 185~~) Even Livery is dispensed with only from necessity. (Pow 195. 185.) ~~Rep.~~ (Ante, 11. Post, 48. 137–8.

~~...~~ Some decisions are opposed to this rule: But they are not consid.d as law. (Pow. 185.

[+] Hence, one cannot, in gen.l give by devise, what he could not convey by deed: either of possibilities, contingent int.s in int.s (vid. ante, 3.)

Except, as to an after-purchased lease for years. This being only a Chattel. (Pow 187. (1 Wm 575 5 B. 169. Sal. 237.) — For a will of personalty is not considered at com. law, a gift of a specific thing, but as the appointment of an heir ~~or successor~~ ~~...~~ to one's personal estate. ~~...~~ (Pow. 188. — (Post, 144. This stands upon y.e footing of all other personal prop.y

So in devises by Custom, it is necessary that the devisor sh.d die seised — for the conveyance is not consummated, till testator's death. Ergo, if the owner of land, after devising it, is disseised, & continues so till his death, the devise is void. (Pow. 184–6. 566

(turn over)

Who may devise. Title by Devise.

(Incidents.
Disseisin.

in Title by Deed,
9.

Cow 611. Holt 748. 1 Roll 616. (Post, 138. 157.) — For the estate is converted to a right, wh. is in nature of a cause of action (ante, p. 11.); & such cannot be conveyed by deed. (2 Bl. 290. Co. L. 48. a. 214. 399. — (ante, 35.)

\+ for yᵉ purpose of defeating a devise.

Secus, of a disseisin by fraud & Covin,\+ the devise is good in Eq. — (Cow 611. Holt 378. 1 Eq. ca. ab. 174. Ex. Testa. disseised on yᵉ approach of death, to defeat a prior dev.

Same rules obtain under the Stat. of H. 8. Cow 183. 198-9. 201-2. 2 Bac. 82. 1 Mod 217. Holt. 251-2. 243. Plow. 341. — Ante 9.

But if the owner, being disseised after the devise made, re-enters, & dies seised; the devise is good. For he is considered as having been seised ~~absolutely~~ continually. (2 Bac. 52. Sal. 238. Cow. 185-6. 611. 11 Co. 51. a. b. Holt. 748. — Carth. 205.) — being actually so, at yᵉ inception, & consummaⁿ of yᵉ devise.

So, if the owner is disseised at the time of making his devise, but afterwards enters, & continues seised, till his death; the devise is

Incidents – Disseisin.

is good. For he is supposed to have been seised ab initio – He is seised by relation – (See action for mesne profits) Pow. 185-6. 2 Bac. 52. Sal. 238.

It has been much doubted, whether a devise of lands, not owned at the time by devisor, but specifically described, & afterwards purchased, is good. – Decided not to be. – [Contrary opinions] Within y^e same reason, as if not so described. Pow 200–2. Plow. 344. Holt. 251-3. 243. L^d Ray 438. Sal. 237. 3 Burr. 1488. 7 T.R. 406. 414 arg^t. ~~[illegible]~~
– His intention (however clear), to devise y^e after-purchased land, cannot be effected, consistently w^t y^e rules of law.

Upon the same principle, a devise by mortgee, of the lands mortg^ed, will not pass the Equity of Redemption, afterwards purchased by him. (Pow 201. 3 Ch. R. 79.

The common actual seisin by Devisor is not necessary. Semb. ~~[illegible]~~ – "Having," (or "Seised") is not used in our Stat. – Ownership sufficient. – So in descents by our law. Right of poss^n is equivalent, here, for most purposes, to actual poss^n. 3 Day, 166. (2 Bac. 51. 2 Bl. 377. Pow. 216. 218.

Title by Devise.

Who may devise. (Cestui que trust.)

And in Eng.^d, as here, a person, having an equitable estate in lands, ((~~i.e. a claim to them in Equity~~)), may, (in equity), devise the lands themselves. E.g. Executory agreement by A. to sell land to B. – Before conveyance B. devises them, & dies. – It is good in equity – Eq.y considers as done &c. (Cow 203–5. 207 &c. 2 Chy. Ca. 144. 9 Mod. 78. Prec. Chy 320. 2 Vern 79. 2 P.W.^ms 631. 1 Vesey 494–437.) – For Vendor is a trustee, in Equity, for vendee; & on a bill by the latter, the C.^t w.^d decree a specific performance. (Cow 208. – (Vol. 1. 53.) ==

== This is not ~~treated~~ regarded as a devise of a future estate. – The land belongs to vendee, from the time of y.^e agreement, in equity. ....

~~+ no (want of) seisin~~ (Nor is it a ca. of disseisin: For there can be no strict seisin, or disseisin, + of a mere eq.y. Besides, trustee holds for cestuy que trust – ergo, not even analogous to disseisin.)

But the land will not pass, even in equity, by a devise, executed before the executory agreement, is made. – No present interest in equity. (Cow 212 &c. 2 P.W.^ms 629.) } vide 45. Semb. (Sed by L.^d Chancellor), if the devise was for payment of debts. (Cow 215. 2 Ch.^y cas. 144.) Sed. Quaere.

Ante, 9-11.

Of things devisable under Stats Henry 8th & rd sum

§ 1st. As to the subject-matter: —

Lands.

~~+ The meaning, then is, that a fee-simp.~~

All lands, not devisable by custom, are devisable under those Statutes (Pow 200). "All Lands", here denote the subject-matter, not the tenant's estate.; (Pow 229.) For, all estates are not devisable, tho' ~~but~~ all lands are, — if the tenant has a devisable interest in them. (~~ta~~ (Ante, 9-11.)

The meaning of yt. rule, then, is, that a tenant in fee simple, of any sort of land may devise it.

* This rule is founded chiefly on the words "of annual value," in the stat. of H. 8 & see Pow. 41-5.

Tenements & Hereditaments," not valuable,* are not devisable, under these Stats. — as, personal franchises — ways &c. Pow 220. 227.41-5. 3 Co. 32 b. 10 Co 81. Ro Ez. 359). ~~[illegible]~~ Ways not devisable here, ~~[illegible]~~ being not estates, but mere easements. ~~[illegible]~~ "Lands" & other estates are yt. words, in our Stat.

~~Advowsons, devisable, being valuable Pow 220-6. Ro Ez 369. — Co Litt 6 b.~~

Things incorporeal.

But rents are devisable under Stat H. 8 — (se) if the owner has a desc[illegible] interest in them.) — Pow 226. Litt § 585. Co Litt 585. 3 Co 33 b.

So of advowsons; they being valuable. (Pow-220-6. ~~Litt § 585.~~ Co. L. ~~585~~. 369. 1 Atk. 619.

Things devisable.
- incorporeal.

Title by Devise.

An annuity in fee, is also devisable — differs from a rent in this, that it is a yearly sum, charged on the person of the grantor. (4 Cru 229 Co Litt. 144)

2.d What estate ~~(in devisor ...)~~ i.e. what interest devisor must have in the thing he devises, under ye stat. of H. 8. & our stat.

In Eng.d no other than tenant in fee-simple ~~estate~~ can devise under stat. of H. 8. The words "estate of inheritance" in 32 H. 8. being declared by 34 of H. 8. to include estates in fee simple only. 4 Cru 218. 224. (~~...~~ Ante, 3.)

The words of our stat. being gen.l "lands & other estates", include also estates pur auter vie, ut ante (Page, 10.) but not estates tail — because of ye paramount right of ye issue in tail, who, by our stat, are entitled to ye fee simp.

Chattel interests are devisable at Com.n law. Bro. 6. 2 Bl. 374. 1 Inst. 7. ~~...~~ — as terms for years (Ante, 2.) — No provision for devising such interests, is then be made by the stat. of wills.

Title by Devise.

Things devisable.

There are four several estates of inheritance in lands called estates in fee-simple. 1st. Fee-simple absolute – 2. Determinable – 3 base-fee – 4 Conditional. (Cow. 230–2. 237. Plow. 557. 2 Bl. 109. 110.) – Since the Stat. de donis fees conditional are confined to personal hereditaments. E.g. an annuity descendible.+ (Cow 232. 237. 230. 1 Ves. 180. 1 Bro. Chy 326.)

+ to lineal heirs, only, remains a fee cond.l: it is not within ye. stat. de donis.

All these are devisable by Stat. of H. 8. – "Fee-simple" used in its most general sense; as distinguished from estates tail & estates pur auter vie. (Cow 232. 3 Bulstr. 184.

As estates in fee simple may be in poss.n – or, not in poss.n – as to the former, there has been no contrariety of opinion – always holden devisable. (Cow. 232–4–5.

ante, 9. 11.

Fees simple, not in poss.n may be divided into: – 1st Reversions. 2d Vested rem.rs – 3 Contingent rem.rs executory devises & 4. Estates subject to a condition of re-entry. (Cow. 232–4. Plow. 154); or rather a mere right of re-entry, in futuro, on ye future breach of some cond.n – all devisable, except ye last

Things devisable.

Title by Devise.

These interests are all devisable, except the benefit of y^t condition in the last. (Pow 233-4. 3 Bulstr 184.) — tho' formerly holden that the 3^d Class was not. Cow 34. Sea 600. 2 Bl. 222. 1 H Bl. 33. Leo Car 251. 293. or 387. 405. ... (See "Estates in Poss^n" &c 28.) (ante, 9.) (examples:)

As to devise of reversions vid. (Pow 234. 10 Co 78^a. 2 Vern. 621. 2 Ventr 285.) (ante, 9.)

A reversion in fee expectant even on an estate tail, is devisable under these Stat^s. of H 8. (Pow 235. 10 Co 81. Hob^t 313.

So a rem^r. expectant on an estate tail, is devisable. (Pow 235. 1 Roll Abr. Pollett 111. — Indeed, his, + is a vested rem^r. 12 Mod^n 181-2. 184-5. 192. Hob^t 30-1. Sal 232. 3 P W 288-9. n. ("Estates in Poss^n" &c 14.)

+ when limited unconditionally.

In Conn^t. there can be neither reversion nor rem^r. expectant on an estate tail +: since it becomes an absolute fee simple in the immediate issue of the first donee. (ib. 43.)

+ unless y^e first donee has no issue in tail, at his death.

Things devisable.

Title by Devise.

Pow. 56. Estates in feesimple may be legal, or equitable. — Both are devisable under Stat. of H. 8 & ours. E.g. An equity of Redn. — (see title "Mortgages" ~~[illegible]~~) — (Pow. 109. 2 Burr. 978.) — So, if an estate is granted to A. in trust for B. & his heirs; B. may devise it. (Pow. 235-6. 1 Leond. 257. — (Ante, 48.) Like uses before St. 27. H. 8. (Ante, 2.

What estates created. — What Estates may be Created by Devise. —

Tenant in fee-simple absolute may devise an absolute fee-simple; — & of course, any other fee simple, which can be created, in the subject, by act of the party. (Pow. 237-8. 3 Leond. 216.

So, one having an absolute fee simple in poss., rem., or revers. may, by devise, create a fee tail+ (Pow. 238-240-1. 1 [illegible] 609. 7. 2. Co. Litt. 111.

+ or any less estate: as, for life; remainder, or for years. (Pow. 243. 10 Co. 78.

But a devise of a fee after a fee, is not good. E.g. grant to A. in fee, & if he die without heir, to B.+ in fee. (Pow. 238-9. 2 Co. 97-8. Pro Car. 57. Sal. 231. —) This rule however relates to devises, considered as dispositions in praesenti — not to

+ a stranger (i.e. not a collateral heir).

Executory

What Estates created by.

Title by Devise.

executory devises — Pow. 250 &c.) — By these the rule is, now, greatly modified. ~~[illegible]~~ (Pow. 238 marg.) — But the case stated, by way of example, w^d be void by way of executory devise — y^e contingency being too remote. "Estates in Poss^n" &c. page 18 &c.) — As to rem^rs, created by devise, & executory devises, see "Estates in Poss^n" &c. Pow. 248. 270.

So, tenant in fee may devise to one for his life or pur autre vie. ~~[illegible]~~ (Pow. 240.)

The reversion in these cases descends to the heirs of devisor. (Pow. 241.

Tenant in fee, after having devised for years, or for life, or in tail, may devise other interests ~~[illegible]~~ out of the estate remaining in him, (i.e. y^e reversion), till his whole fee is exhausted. The latter to take effect upon the expiration of the former. E.g. To A. for life — then to B. in tail — then to C. in fee. (Pow. 241. Plow. 35. 1 Sid. 285. 2 Keble 29. 85. 84. 1 Leon. 144.

what estates created by.

Title by Devise.

And a limitation of the ~~use~~ estate remaining in lieu or expectancy may be either by way of rent, or by devise of the reversion. (Cru. 242-3.) (See "Estates in Poss. &c.") i.e. by ye same will, by wch ye particular estate is created, or by a subsequt instrumt.

A term for years in lands may be created by Devise. Cru 243. 10 Co. 78b. — 8 de novo. — (A Term for years cannot be created out of lands, de novo, at Com. Law? Cru 6. 243 - 2 Bl 374. — note 2.

Estates created by devise may be absolute or conditional. e.g. "To A for life" generally — or "to A for life, he paying a certain rent" to the heir &c. Cru 243-6. Dyer 126 B. 348. 13.

And these conditions may be precedt or subsequent. Cru. 246. — See "Estates on condition."

Title by Devise.

What Estates created by.

There are no technical words, necessary, to distinguish these two species of Conditions— Every Condition is to be construed, as precedent, or subsequent, according to the apparent intention of the devisor. (Pow. 246–7. Talb 164

But a condition, describing the qualification of the devisee to take, is, in its nature precedent— E.g. to A. provided she marry, with consent of testator's exors— Marriage with their consent is a condn precedent. (Pow 247–8. 2 Vern. 573. 340.

But a devise to A. & his heirs upon condition that within 3 mos. after testator's death, he execute a release of all demands to B. is subsequent. ~~It— devise— a present interest~~. (Pow 248. 1 Vesey 420. Talb. 165.)— It is a devise of a present int. tho' defeasible.

Estates created by devise may be either legal or equitable.— A devise of lands (where devisee has the legal estate)— or of a use, since the stat. of uses (27 H. 8), is a devise of a legal estate. (Pow. 270–1.) For the stat. executes the use, i.e. transfers the legal estate to it. (2 Bl. 335. Pow. 8. 236. 275 &c. Page, 2.) } ante 53.

Title by Devise.

What Estates created by.

(Uses & Trusts.)

1st. That a devise of a use before the St. of uses was of an equitable estate only; & so at this day, is a devise of a trust* in equity. (Pow. 271.) – [*Property is s^d. to be holden in trust when the legal title is vested in one, ~~in trust for another. (Pow. 283).~~ & the beneficial int. in another (Pow. 283)

Uses were devisable in equity, ~~[illegible]~~, before the Stat. of uses. Pow. 271. 8. (Devise 1.)

If land is devised to one, no use being limited upon it, it cannot be averred to be to the use of any other than the devisee. For this w^d. be contrary to the intent upon the face of the instrument. (Pow. 271. 4 Co. 4. – Deeds, 18.

~~But~~ If a use is devised ~~[illegible]~~ it will enure to Cestui que use & will be executed by the Stat. of uses. Pow. 271. 2 Vent. 312. [illegible] 107. 1 Leon. 253. Cop[illegible]. 4. [illegible]

What estates created by.

(Uses & Trusts)

Title by Devise.

If land is devised to A. & his heirs, to the use of A. for life only; the use of the fee is in devisor's heir. Pow 272. Soph. 4.

2.° So, an equitable estate may be devised, thro' the medium of a trust. (Pow 282) (~~Property is s.^d to be holden in trust, when the legal estate is vested in one, & remains in him, in trust for another.~~) Pow 285. 2 Bl. 335-6.) (As if lands are devised to A. & his heirs, in trust, to pay over the profits to B: Here the equitable, (or beneficial) int.^t is vested in B.

Indeed: such uses, as are not executed by the stat. are now called trusts. Pow 285-7. 2 Bl 335-6. 1 Eq. ca. ab. 383. 3 Mod. 63.

As to the origin of trusts see 2 Bl 327. Pow 283-8. 289.

Present Difference between use & trust: — The former + carries the legal estate — the latter does not, (Pow. 282.) (Vide) 2.

+ since y.^e stat. of uses,

Title by Devise

What estates created by. (Uses & Trusts)

• For the distinction between trusts executed & executory see (Pow. 2. 286-7. 1 Atks. 581.) 1st Where the trustees are directed, in the instrument, creating the trust, to execute a Conveyance of the legal estate; – it is executory. 2d Where no further Conveyance is directed, it is executed. – But the executed trust does not include the legal estate: it is still an equitable interest. – ~~"equitable trust"~~, Pow. 286-7. 1 Atks. 581.) A decree or Conveyce. of the legal estate is as necessary in the one case, as the other. (Idem.

• Ld. Hardwicke says, however, that all trusts are, in their nature, executory. Pow. 287. 1 Atk. 581. 2 Vesey 323.

Powers.

One may create, by devise, not only devisable interests, but a mere authority over such interests. E.g. Devise that Ex'rs shall have the disposing, setting, letting & ordering of testator's lands. • Such a devise however, gives devisee a power only to manage the land as he pleases, & to lease it at will; not to sell or lease for years: for he has no interest, + Pow. 289. 290. 291. Dyer 371 b. Cro. Eliz. 678. 734.-4. 341. Vol. 3 (Page, 14.-40.) – (In [illegible], b. 9. p. 2. ~~the [illegible] depends on a future contingency – & is not devisable~~, for [illegible] (book 9.

+ & no power to sell.

What Estates created by Powers)

Title by Devise.

But if one devises, "that his exors shall sell his land" — or, orders "that his land shall be sold by them" — or, "appoints, constitutes, & empowers them to sell;" — they have authority to sell (Pow 292–3. Mo. 774. Co Litt 113. 1 Roll 330. 14.

Devise: "If my personal estate is insufficient, I devise my land to A. & B. as trustees, to sell for payment of debts &c — & all the residue of my real estate to A." — Personal is suffic. — A. takes all the real, immediately. Comp. 43. 2 Ld Ray 1324–5.

Authorities (i.e. created by devise), over lands, are of two kinds: 1st, naked — 2d. Coupled with an interest.) Pow 292. Comp. 263 arg.

Powers were unknown at C.L. before the Stat. of uses. 27 H 8. — they were inexistent — in Eng. only — modifications of uses. Comp. 263. 266.

Powers created.

1st. A naked authority, is a bare power to sell &c. — no interest being devised — as in the last examples. Saba. (Pow. 292.302. Co.Litt 113. 1 Roll 330. Cro Car 382. Mo. 774. — vid Co.Litt 113 n. 2. 236. 181. b. n. 3. Comp. 466. 3 East 553.

In these cases the freehold descends to the heir, till the sale. (Pow. 292—3. &c. Co.Litt 113. 1 Inst. 236.265. 3 East. 553.

And, a release of such authority by the person empowered, is void. — E.G. Exr. empowered to sell, releases to the heir — the release passes no interest. For Exr. has none.+ (Pow. 293-4. Co.Litt. 446.) He may, still, execute ye authory.

+ Nor does it transfer ye authory: For yt is, in its nature, not assignable — it being fiduciary.

Such authority must be strictly pursued. — & the execution of the power must, therefore, be construed, with reference to the power itself. (Pow 294. 2 Tr. 241— 2 East 376. 1 Burr 120. Comp 267. 2 Ves. 644. 1 Wils. 176.

Title by Devise.

Powers created by.

+ Of course, the person, to whom it is given, cannot himself devise it, (or assign it in any way).

So, the authority is strictly personal – not transferrable – being founded upon personal confidence.+ – If there are two, & one dies, the other cannot execute it. – (So, even tho' both are exors: For, they take, not as exors, but as trustees.) (Pow. 294–5. Jenks 44. 1 Anderson 145. Dyer 177. 32. – Vid. 1 Root. 67. "Municipal law, 32.) ~~3 ...~~)

Of course, the power does not survive to the exors of the original exors in ye last ca.

So, if the devise is that his land shall be sold by "his exors, or "the exors of his exors"; & surviving exor appoints exors, & dies; they cannot sell. For they are not exors to both the original exors! (Pow. 295–6. Mo. 61.

(under ye power)
But a sale, satisfying the words of the devise, will be good, tho' this survd. E.g. one appoints 3 exors & devises his land to be sold "by his exors" – If one dies, a sale by the other two is good. (Pow. 296–7. 1 Anderson 146. Cro. Eliz. 26. Dyer 176. 5. 219. A. Co. Litt 113 A. Mo 341).
Aliter of a sale, by ye last survivor.

Title by Devise.

Powers creation by.
Pow. 307. 295-9.
2 Leon. 220. Dy. 371.
Lev. 30. 1 Atk. 420.
1 Bac. 200.

If testator devises that his land shall be sold, without naming the person, by whom; his exors are the proper persons to sell, — ~~(Pow. 3... [illegible])~~ if they are to distribute, or administer, the avails: As, to pay debts &c. (Introduce section infra ‡) But if the exor has no concern with the avails of the sale, the heir is the person to sell: ~~as if the money is not assets in the hands of the exor~~ (1 Atks. 420. Pow. 299. 1 Lev. 304. Pow. 307.) — That is, if the avails are not assets in the hands of the ex.; the heir is the person to sell. For ye legal title is in him, & no authory given to any other.

‡ And in this case, ~~[illegible]~~ the surviving exor may sell alone. For they take as exors — virtute officii: (Upon the same principle, it seems, upon which the exor of the exor might sell). Pow. 295-9: 307. 2 Leon. 220. Dyer 371 b. (~~[illegible]~~) Executorship being deemed an office; & between exrs, as such, ye right of acting in ye office, surviving to ye survivor. (Toll. Ex. 114. Talb. 127. 3 Bac. 50. 2 Term. 512. Com. Admr. B. 7.) — (This rule of survivorship holds also between co-admrs. (Ibid.

If the person thus empowered to sell, refuses to do it, those for whose benefit the sale was intended, may, in Chy compel him to sell. (Pow. 300.) If the person appointed should die; the Ct of Chy wd supply a trustee. Semb. (Pow. 303.)

Title by Devise

Power, coupled wt. an int.t

2.° A devise of land ~~(or of an estate)~~ to ... for to A.S.), to sell, is a devise of an authority coupled with an interest+. (Pow 301 302 1 Inst. 236. a. 265. - vid Cobell. 113 n. 2. 236. 181 b. n. 3. Pow 304.) [°Distinct from a ~~contingency~~ possibility, so coupled. (ante, q.). The latter is a conting.t int.t - not necessarily connected wt. any delegated power].

+ It is an immediate d. v. of ye land itself, for ye purpose of sale - not of a mere autho. y sell.

So, if one devises the profits of land to A.+ till testator's son is 21, to educate him; the authority of A. is coupled with an interest Pow 301. 2 Leon.d 221. 3 Le. 78. Dyer 210. It is a dev.e of ye profits, for ye purpose expressed; and a dev.e of ye profits is, in effect a dev.e of ye land.

+ for a special purpose, as

In these cases the devisee, (not ye heir) shall have the estate, till the expiration of the term limited; - & if devisee sh.d die, his Representatives will hold it, during that term. ~~limited~~, (Pow 302. Cro. El. 252. Hob. 285. Cobell 112. 113. 181. Hallon 36. 2 Leon.d 221. 3 Le 78. 1 Dac 200. ... it is his estate during the term. - See vid Evants v Chittenden, 2 Day, 338) Carter,

And the estate of devisee will continue till the expiration of ye term, tho' the object of the devise sh.d be sooner answered, ~~before~~ or ~~...~~ sh.d sooner fail. +

+ As, where ye dev. is for a certain term, for paym.t of debts; & they are all p.d ~~within~~ before ye time expires.

Powers created by.

+ For yᵉ dev.ᵉ is construed to be of an intᵗ, to continue, till yᵉ son will, by computᵃ attain full age — i.e. till he must attain it, if he lives long enough.

E.G. If the son in the case above supposed, dies, before 21.+ (Cow 302. 1 Cha. Cas 98.) Dyer 210. —

The rule is otherwise, as to naked authorities. They are only incidents to yᵉ trust, to wᵗ they are annexed, & therefore, expire wᵗ it. Ex. Devᵉ, yᵗ ex.ʳ (or J. S.) shall have yᵉ managemᵗ of testa's estᵉ till his son attains full age, to educate him — & yᵉ son dies under age. The authoʸ, ipso facto, ceases.

Under a limitation of an estate to "such child, or children," of A. as B. shall appoint an exclusive appointment to one spec.ᶜ child. is a good execution of the power. (1 T R 432. 2 Vern 513. 1 P. Wms 149. 1 Atks. 384.) For it satisfies yᵉ words of yᵉ limitᵃ.

A power to appoint by devise is not executed by a mere residuary devise — E.G. A. having a legal estate, in trust, with a power to devise to either of his sons, devises "all his estates" to his son B. "after paymᵗ of his debts" &c. — Trust estate does not pass. (8 T R. 118. 2 H Bl. 136. 1 Atks. 558. 2 Bro. Chs 297. [illegible] 8 T R 122. — Clear intent to pass it, appears. — no allusion to yᵉ power, or trust estate. The inference is, wᵗ he intended to devise his own proper estate, such, as he might charge wᵗ his debts.

An Appointment by will, is no execution of a power to appoint by deed. (Comp 260. — & e converso.

Title by Devise.

Who may take by Devise.

In general all persons, not incapacitated by positive law, may be devisees.

Under the Stat 32 H. 8. as explained by Stat. 34 & 8. devises in mortmain are not allowed; i.e. devises to Corporations or bodies politic (Post 151.) — The Stat 43 El. authorises, + devises to Corporations for charitable uses; but the execution is much narrowed by Stat. 9 Geo. 2. Cou 314. 1 Bl. Eq. Ca. Ab. 136. 1 Bl. 263. 1 Bl. 478-9.

+ by exception

In Ecclesiastical Corporations are not incapacitated to take by devise. Now, then, all Corporations which can purchase hold in perpetuity lands, may be devisees. ~~to a certain extent~~ except so far, as they are prohibited, or incapacitated, by their acts of incorporation

+ by any gen. law

Devisees, then, may be natural, or civil, persons, except ~~aliens~~: so far as the latter are disqualified by the above Stats. (Cou 315) — or by ye charter, or act of incorporation

+ in Eng.

Title by Devise.

Who may take by devise.

1st. Natural persons, capable of taking by devise, may be either in esse, or not in esse. (Pow. 315.) — i.e. born, or unborn, at the time of the devisor's death.

Those in esse may be devisees, unless prevented by some civil disqualification. (Pow. 315.)

Coverture is no disability× Husband indeed, may, at law, defeat the devise by disagreeing to it; but Chy will interpose, to prevent him from injuring the wife. Pow 315. Perk. § 43–4.

× to take by dev.

So wife may be devisee to husb. tho' she cannot be grantee: for a devise does not take effect till his death. (Pow. 315-316. 1 Eq. Ca. ab. 173. 9. Co. Litt 112. b. 1 Roll 610. Holt. 241.): at wh. time the legal ~~union~~ unity of the parties ~~ceases~~ is at an end.

See Deed, 14.

An alien friend may take, as devisee; but he can hold, only, till office found.× The estate then vests in the King — here, in the State, I suppose. (Pow. 316. 318. 2 Vesey 358. 4 Leon. 84. 9 Co 141.) — (3 Bl. 258-9, as to office found) — [It is an inquest, or verdict, of a particular kind, finding some fact — as, in ye ca. ye fact of alienage.]

× otherwise called an inquest of office

Who may take by devise.

Title by Devise.

Tit. a surname,

An illegitimate child cannot be a devisee, till he has acquired a name, by reputation; – but he may then take† by that name – e.g. Devise to "the son of A." is not good, (he being a bastard) till he has acquired the reputation of being A's son. – A devise to "A. B." he having acquired the name, is good. (Pow 319. 338. Co Litt. 3 b. n. 1. Dyer 313. Noy 35. Perks § 26. Swinb. 239. 2 Sid. 149. 1 Atks 410. ~~[illegible]~~ Mo. 10. 6 Co 65. 2 Rol. 43.)

† tho' he is illegitimate. Post. 78.

– But, if a devise is made to "the Children of A"; his legitimate, will exclude his illegitimate, children.+ (Pow 344 5. Mo. 10. Noy 35.)

+ Swinb. For y^e former only are regarded legally as his children; & y^e words are satisfied by applying y^e whole to them.

~~– Suppose such a devise by y^e mother of the bastard: – no diff^ce. Swinb. (Pow 345. Mo. 13. Co Litt 123 b. Dyer 345.)~~

And if such a devise is made by the mother of an illegitimate child, the rule is the same. Swinb. (Pow 345. Mo. 13. Co. L. 123. b. Dy. 345.

See Parent & Child, 54-7. & Estates in Post. p. 23.

2^d. As to natural persons not in esse – as children in ventre sa mere, at the devisor's death. – ~~[illegible]~~

Infants in ventre, &c.

A distinction was formerly taken between a present devise to an infant in ventre sa mere & a devise by way of rem^r. – the latter was holden good, if the infant was born when the particular estate determined + ~~[illegible]~~ Pow 320–1. 2 Bulstr. 275–6 Mo. 637. Sal 228.

+ otherwise, not good.

Title by Devise.

who may take by devise.

'Inft.s in ventre &c.

But if ye devt were immediate, & ye devee not born, at testa's death; it could not take effect. (Sid.): Because ye freehold was suppd. wd. be in abeyance, till devisee's birth. (p. 70. bot.)

+ for life,

~~+ in being, when ye contingency happens~~

+ Altho' ye particular estt. determines, before ye child's birth.

But now by Stat. 10 & 11 Wm. 3. if an estate is limited to one,+ with a contingent remr. to his (unborn) child, a posthumous child+ shall take, as if born in father's life-time.+ (2 Bl 169. 3 Bac 124. 4 Ib 312.). [See Qu. whether this stat. extends to Devises? Sal. 228. — Semb. non: The words being, "by any marriage, or other settlement" &c.

He is regarded, as in being, for ye purpose, at his father's death.

+ at testa's death,

‡ a devise to such a one;

So, a distinction has been taken between a devise, to a person, not in esse,+ per verba de præsenti, ‡ & per verba de futuro — In the latter case, it is well settled that the person may take. E. g. To an unborn child, when it shall be born. Com 382. 1 Eq-ca. ab. 173. 12. 2 Bulst. 275. 1 Sidr 153. 1 Lev. 135. Sal. 229. Stra. 1093. 3 Bac 124. Fearne 429. 5 T. R. 50-1.

+ of ye testa.

The latter is good by way of executory devise. (3 Bac 124.); & the freehold descends to the heir+, in the mean time. (B.-Pow 326. 1 Roll 609.*

+ or rather, immediate

‡ The last distinction does not contemplate remrs. but direct+ devises to persons unborn — without any particular estate, meang

Title by Devise.

Who may take by devise. (Inf. in ventre &c.)

So under a devise to "such children as A. shall have living at his death", a posthumous child will take. (5 T.R. 51 arg. Prec. Ch. 50. 1 P. Wms. 246. 2 Freem. 223. 2 H. Bl. 399. 1 Bos. & P. 243.

But whether a devise to an unborn infant, per verba de praesenti, is good, (he being unborn at devisor's death ‡), is not settled in Engd according to Powell.* + (Pow. 322-332. + The opinions are contradictory. Dyer 303 b. in marg. 337. 2 Salk. 273. — 6. Sal. 230 Raymd 83. ... 177. 1 Lev. 135. 156. 1 Freem. 244. 2 Mod. 8-9. 1 Wilson. 105. Fearne 428.) ~~[illegible]~~

+ e.g. "I devise to the eldest son of A. B. & his heirs" — A. B. ~~[illegible]~~ having no son born ~~[illegible]~~ at devisor's death). — Here the words do not import a future or execut.y disposition (as they ~~[illegible]~~ do, in the two former cases); but are in the common form of an immediate devise, to take effect on testator's death.

‡ (as to the unborn son &c.) —

The weight of opinion is in favour of the devise.* (Pow. 330. 3 Bac. 124. Doug. 476. arg. 4 Burr. 2157. 1 Bl. R. 643. 2 Wils. 225. Fearne, 428.

* Is not the rule now considered as settled that way?

The objection to the infant's taking in such a case is, that, as he has no capacity to take, when the will ~~devise~~ takes effect, the freehold must be in abeyance till he is born, if he takes at all. (Pow. 324. 3 Bac. 124.

Title by Devise.

Who may take by devise.

Inf.ts in ventre sa.)

+ per verba de futuro,

‡ But the ground of the obj.n itself fails. For it is now fully settled, that when a valid dev.e is made to an unborn child,

But why does not the objection, if it amounts to any thing, hold in the case of an executory devise+ to such an infant — which is clearly good? ‡ The freehold descends to the heir of dev.r ~~[illegible]~~ till the infant is born. (Pow 326. 1 Holt. [illegible] 1 P. W. 508. 2 Salk. 9. Doug. 481. 2 Wood.n 233. ~~[illegible]~~) And y.e heir is not accountable for intermediate profits. 5 T. R. 57. ~~5 T. R. 57.~~ 3 Wils. 526. Co. Litt. 11. b. n. 4. — (See Est.s in Ex.s. &c. 8. 19.

At any rate, if there are express words used, or facts adverted to, in the devise, affording an inference, that testator was aware of the devisee's incapacity to take immediately; he shall take it as by a future devise. E. g. "To the unborn child of A. when he shall be born" — so, "If a child shall be born to J. S. I devise to him or her," &c. (Pow 332-3. 1 Lev.s 135. 1 Eq. Ca. ab. 173. n. 2 Kebb. 300. 1 Ib. 752. Sal 229. 230. Talbot 145.)

And accord.g to the more modern, & better, opinions, every devise to an unborn child, + does afford such an inference:

+ described, as such, in y.e dev.e

Title by Devise.

Who may take by devise.

Infl. To a venter &c.) ±For y^e intent is clear, y.^t y^e limit^n shall take effect, on y^e future birth of such a child: tho' y^e disposition is intended, as ex.^d

influence: ± ~~Devise, & ... executory disposition~~ ~~...~~ Cow 32? 329. 336 marg. 4 Burr 2171. Doe 230. Fearne 128. 1 Wils 135. Pollod 8–9. 1 C Mus 486.

The qu. ~~Court~~, stated (p. 70) to be unsettled seems now, then, to be nearly, at least, if not entirely, at rest.

If a ~~...~~ Devise is to infant in ventre with a conditional limitation over, if no living child born, (~~...~~) the limit^n over to be... (Cowp. 40. Comb. 437. 2 Eq. Ca. ... 351. ... 485–7 – (See Conting.^t Rem.^r &c.

Civil Persons. ante 55.

+ in other words, a person may take, by dev.^e in a civil capacity.

II. Civil persons may be devisees,+ as Crown or Bishops. – E.g. Devise to the Crown &c. is good – Cow 336 – So, civil persons, not in esse, if the intent is clear. E.g. to the Bishops of ... (Cow 336–7. These are called "civil" persons, because they take, as ex.^d – virtute officii.

+ They are not, as (~~individ.~~) parishioners, a corpor.^n – tho' evidently intended to take, as such.

But y^e parishioners of a parish are not such civil persons as can take in that character. Cow 336. 509. (Vol. 814 ...)+ ~~...~~ (But y^e parish, if a corpor.^n, may take in its corporate capacity)

Nor, by our law, can a "church," (meaning y^e body of communicants in a congreg.^n) take as such – for same reason – (Greenwich ca. 2 Conn. R 287.

Title by Devise.

Who may take by devise. (Description.) In Deed, 25.

1 Fream. 293. Co. L. 3. a. 11 Co. 21. a.

Every Devisee must be properly designated, or he cannot take. The designation may be by either naming or describing him. And tho' his name is mistaken; (~~1 Fream. 293. Co. L. 3. a. 11 Co. 21. a~~) still, if he is sufficiently designated by description; he may take. — Not so, if the whole name &c. applies to any other person. (1 Pow. 498. 6 T.R. 671.)* ~~This position requires to be taken with the qualification. — Parol evidence may under certain restrictions, be admitted to explain the ambiguity of what Post.~~ Pow 407. 405. 340. 337. 498.) Cont. 87. 110.

*This position requires to be taken w.^t qualifica.^n: For, under certain restrictions, parol ev.^e may be admitted to explain the ambiguity — Of w.^h post, 31. 107 — 109. 110. — & See tit. Ev.^e

) The rule supposes no explanatory parol ev.^e ~~offered~~ exhibited.

— E. g. "to the Governor of the State" — "the Treasurer &c." (Hob. 32. Co. Litt. 3 b.) — So, "the son" of such a one is sufficient (Pow 340. 1 Roll 837. Hardw. 91. —) — if y.^e latter has but one son: Aliter, if he has more y.^n one. So. "American Ambassador, at y.^e court of St. James."

(Bastards.)

And the description, tho' not strictly applicable, may be made good, by reputation. E. g. "To A. the son of J. S." — A. being a bastard. (Pow 338. 1. Atk.^s 410. — ~~[illegible]~~ — ~~[illegible]~~ (Post, 88.) — In this case, if he has acquired the reputation of being son to J. S, he may take.

But this rule does not hold in favor of a bastard, born after a devise made by such a description; for he must be capable of taking, if at all, by being reputed y.^e son of J. S.; but he cannot gain the reputation of being y.^e child of any one, but by "continuance of time."* Pow 338 – 9. Cro. El. 509. 510. 6 Co. 65. Co. Lit. 123 B. 1 P.W.^ms 529. — (*Besides, the future birth of such a child is potentia remotissima. "Estates in Expec. v. 11.") ante, 58.

~~* i. e. as the use of time before the devise ... the ... supposed*~~

Who may take by devise? (Description of devisees) (Bastards.)

Title by Devise.

Hence also, a devise to "all the natural" children of A. will not enure to the benefit of one in ventre sa mere. (Pow. 339. Gilb. 530.) For those unborn are not his children, by reputation; & besides, the possibility, that he may have illegitimate children, in future, is too remote.

A woman may take by devise, under the description of "the wife of A." if she is reputed to be his wife; tho' she is not his lawful wife. (Pow. 340. 8 Co. 73.) — See Deed, 25.

Post, 111. 2. A devisee may be constituted by an equivocal or inaccurate designation. E.g. Under a devise "primo puero" of the devisor, a daughter may take, if such appears to have been the intent. — tho' primâ facie, the words designate a son. (Pow. 340. 496. Dyer 337. Mo. 104–5. Holt. 32. —) And a son w^d take under this description to the exclusion of an elder daughter. (. . . .

So, a daughter may take under the description, "proximo sanguinis" of the devisor, — tho' the adjective is masculine.+ — As if there

+ The term being construed to mean his nearest relation, & next of kin.

Title by Devise.

Who may take by devise

("Description of Devisees.)

there is no son+. (So the elder daughter, in this case excludes the younger). (Cow 342. Cokill v. P. Palm. 11. 303. 16 ch. ab 212. 4. Vid 2 Bl. R 1002.) — Post, 111.

+ For y^e adjective as applied to a female, is only a verbal inaccuracy.

The word "child" or "children" is a sufficient description. E.G. "To A. for life, & afterwards to his "Ch^n" — his ch^n take a life-estate in rem^r. (Cow 344. 6 Co. 17^a. also 220.) descriptio personarum. The word "child" &c. being descriptio personae.

The word "Ch^n" is generally used as descriptio personarum, or, a word of description*: in which case the persons described take as purchasers. E.G. Last case — So, if an estate is devised to A & his Children — he then having Ch^n) he & they take a joint estate, as purchasers. Cow. 344. 6 Co. 17 B. Cro. Ez. 743.

(See for distinctions "Real Propy", p. 20.)

*or, what is y^e same thing a word of purchase — as contradistinguished from words of limitation, or inheritance.

Parol ev. is admissible, to show, whether there were children, or not, at y^e time of y^e dev^e (post 115.): That being an extrinsic fact.

But if A, in the last case had, at the time of making the devise, no child; "children" is a word of limitation+: i.e. the children take, as special heirs. — they cannot take in rem^r as purchasers, because there are no words of rem^r. And they cannot take a present estate as purchasers — not being in esse. Ergo, A. takes an estate-tail+. ~~[illegible]~~ 6 Co 17 B. Doug. 309–310. Cow. 505. 1 Ld. Raym. 456. 400. 1 Salk 219. 1 Freem. 227. 231. 4 B. & C. 294. 1 ~~Eq. Ca.~~ (Post, 115.)

+ denoting the quantity of interest devised:

+ & they, of course, as issue in tail, per formam doni.

who may take by dev.

(Description of Devisees,)

Title by Devise.

And here, as a gen. rule, testa. intention is to be collected from a reference to the state of things existing at ye time of making ye dev.; not at his death. (Post 85.) Ex. "To A's wife," means her, who is A's w. at ye time of making & publishing; not a subseqt wife.

The description of a devisee may be general, or special. Pow. 345-6. — By a gen. description is meant, a designation of any person who may happen to answer the description.

1st General: — As if one devises to J.S. in tail, rem. to the next heir male of devisor — He, who happens to be next heir male, is constituted devisee. Pow. 346. — Post. 89.

So a Devisee may be constituted by a devise to such a "stock" — "family" — or "house" — it will enure to the heir principal of the house or family. (Pow. 346. Hob. 33. Dyer 333.)

If a devise is made to "the posterity" of A: his lineal heir, if he has any, shall take; if not, A's collateral heir of the whole blood. (Pow. 347. 1 Eq. ca. ab. 290. 7.

Title by Devise.

who may take by dev.^e ('Description of Devisees)

If a devise is made to the "next of the name" of the testator; the next relation of his name, whether male or female, shall take. (Pow. 347. Cro. Eliz. 532. Vent. 32.

So a devisee may be described by the words "next of kin" to testator; in which case, the person, answering that description, by the rules for computing ~~the~~ degrees of kindred, will take. (Pow. 347. Cro. Eliz. 576. 3 East 278. 4 Bro. Ch. 207. 3 Ib. 70. 234.) — In y^e ca. those, & those only will take, who answer y^e description, ~~at testator's death~~, under y^e stat. of distributions: And y^e legal comput.^n of those degrees, under y^e stat. always relates to y^e time of the death of testa.^r: such being y^e rule under stat.^e of distributions.

And if a particular estate to another is interposed; still the words "next of kin" are construed to include those, & those only who answer the description at the time of testator's death. (4 Bro. Chy. 207. 3 Ib. 70. 234. 3 East. 278. 294.) — These words are construed, as ~~in y^e stat~~ they are in y^e stat.

So, the words, "the nearest relation of my name," is a good description. But in this case, "relation," is nomen collectivum. & includes all testator's nearest relations in the same degree. (~~[illegible]~~) E.G. all his brothers, & ~~[illegible]~~ sisters, ~~[illegible]~~ of y^e same name, if he has no nearer rela.^s Pow. 347. [illegible]. 497. 1 Vesy. 335.) — His sisters, if married, & of a diff.^t name, w.^d be excluded, in y.^s ca.

~~[illegible]~~ (Post. 79.)

(Introduce, [illegible] p. 79.)

Title by Devise.

Who may take by desc.ⁿ (Description of Devisees)

• If testator explains whom he means by "nearest relations;" persons, not falling within that description, may take. E.g. "to my nearest relations viz the Sisters, & the Nephews". — Here, the latter tho' not so near in kindred as the former, shall take.+ 1 Pow 333. 1 Bro Ch. 32. Vide Pow. 373-4. 405. 407. ~~[illegible]~~ Post, 84. 57.

+ with them.

If one devises to his "nearest relations according to the Stat. of distributions"; his wife, as such, takes no part.+ For tho' she w.d be entitled to a part, under the Stat., she is not his relation i.e. not related by consanguinity — not of kin. 1 Pow 350-1. 1 Vesey 84. 3 Atk. 759. 761.

+ ordinary dev.ᵉ

• If one ~~[illegible]~~, bequeaths personal property thus: "to my nearest relations"; those relations who w.d take under the Stat. of distributions, are the legatees. So. I suppose if the words were "my relations". Pow 351. 497-8. 2 Eq. ca. ab. 332. g. 368. Talb 251. 1 Vesey 84. ~~[illegible]~~ Post, 112.

But, land acq.ᵈ may be limited. (p. 112)

• But if devisees of land were thus described, Quære whether the above rule, w.d hold; or whether the devise w.d be void for uncertainty. Pow. 352 — vide 3 East. 278.

Title by Devise.

Who may take by dev.t 'Description of Devisees.'

+ as well as in the first.

In Conn.t, & other states in y.e union, I presume, the Stat. w.d ascertain the devisees in the last case. + For our Stat. regulates the succession, as well to the real, as to the personal estate of intestates. (~~[illegible]~~ St. C. 255-7. 273.

(p. 77. ≠ Where one devises land to "the heir of his name", it has been a question, whether a daughter, who, by marriage, has changed her name, can take. — According to some this is the distinction: — if she is unmarried both at the time of the devise, & of testator's death, she may take, tho' married when the qu. arises. — (Prec. 352 – 3. Cro. El. 576. 532.) — Secus, if she is married either at the time of the dev.e or of testator's death. (ante 77.

(p. 77. ≠ But L.d Hardwicke seems to be of opinion, that if the devise is immediate, or by way of vested rem.r, it is sufficient if she is unmarried at the time of the devise: — If limited upon a contingency, that her name at the time of the contingency's happening decides her right.) — 1 Ves. 353. 1 Wils. 338. — (~~[illegible]~~ (vid. Post 87.) — This seems a reasonable rule, & conformable to y.e gen.l rule (p. 76. top.)

Title by Devise.

[margin: ... it is may take as debt (Description of devisee.)]

It is a general rule of construction, founded on feudal principles,* that if an estate is devised to one, with an immediate or intermediate rem.^r to "his heirs", "the heirs of his body" — or "his issue"; he takes an inheritance: In the first case, a fee simple; in the two latter, an estate tail. Pow. 355 &c. 2 Bl. 242. 2 Co. 41. 1 Co. 99. Ld Ray. 873. 1 Wils. 323. 1 Burr 38. 4 Co. 82. 294. 5 R. 299. 320. 6 R. 30. 7 R. 503. 8 R. 16. — Fearne 25 &c. Daye ... 4 Burr 2579. Doug. 323. 3 Co. 437. Stra. 1125. 2 Atk. 246 &c.

[margin: Estates in a ... &c. 14. Pow. ... 22.]

When the rem.^r is after an intermediate limitation, the devisee takes an estate for life & the inheritance in rem.^r ‡ — former not merged. Doug. 323. 330–1. 2 Atk. 246. 250.

[margin: * The object of this is y.^e preservation of y.^e claims of y.^e feudal lord upon an heir, succ.^d to lands, by descent; & wh.^h c.^d not be asserted ag.^st one coming in by purchase. — Post, 94.]

[margin: ‡ ex. gr. To A. for life, rem.^r to B. for life, rem.^r to y.^e heirs of A.]

~~In consequence of y.^e feudal rule~~, y.^e words heirs &c. ~~...~~ are expressive of y.^e quantity of int.^t limited to y.^e ancestor: And y.^e sense of these terms has now become interwoven w.^t y.^e whole frame & structure of y.^e law of real prop.^y.

We have a stat. abrogating y.^e rule.

[margin: Vid. Estates &c. 14.]

The word, "heirs" &c. are construed, in such cases, as words of limitation — not of description; — i.e. to ascertain the quantity ~~Pow. 377 ...~~ of interest given to the first devisee; & not to designate the persons, who are to take after him. ~~(...)~~ Pow. 377. Bl. Ch. 433 — ...

(Note, where no previous freehold is limited to the ancestor, the word "heir" is as apt a word of description as any other (vide Ante, 75. Post.)) — Pow. 346

Title by Devise.

Who may take by devise. (Description of devisees.)

+ in yᵉ constⁿ of devises)

• But, as the reason of the rule has ceased, with the abolition of feudal tenures; C'ᵗˢ endeavor, as far as possible,+ to narrow the applicⁿ of it. Pow 357) – It almost always defeats the intention.

A person may, therefore, at this day, take by devise a remᵉʳ as a purchaser, under the description of "heir" &cᵃ tho' a preceding freehold is limited, by the same devise, to his ancestor, if it appears from the devise, that the word "heir" &c was intended as a descriptio personæ. Pow 358. also 372. Co Ez 40. 6 Co 17 B. Sal 224. Lᵈ Ray. 203. 4 Burr 2579. ~~[illegible]~~. 1 Eq ca. ab. 184.

(Estates tr. 14.

~~[illegible]~~

E. G. To A. for life, remᵉʳ to his heir for the end. (Pow. 358. also. 372.

* ~~Issue, in its most proper & technical sense, is descriptio personæ. Pow 359.~~

• So, to A. for life, & to his eldest issue male. Pow. 359. Co Ez. 40. 6 Co 17. B. – A. takes for life only. – Semi, if it had been limited to his eldest heir. Pow 363. 1 Atks. 411. — 2d Co Ez. 313. – 632.)

• So to B. for life, remᵉʳ to his issue male, & his heirs forever. – Here B. takes for life only; & his issue male a remᵉʳ in fee (Pow. 359. Sal 224. Lᵈ Ray. 203.) -- For if B. took in tail, the fee would be limitⁿ n[illegible] or ingrafted on resumption.

Title by Devise.

Who may take by devise.

("Denomination of devisees.")

"Issue," in its most proper sense, is descriptio personæ; but it has been generally construed, in wills, as a word of limitation, except when the intention to use it in its proper sense, has been manifest. Pow. 366. Str. 731. 1 Co. 103 B. Fo. Ca. 40. 4 T. R. 294.

+ (in ye singular number),

If an estate is devised to A. for life, & after, to the next heir male+ of his body, & to the heirs male of his body; "heir" is a word of description: — A. takes for life only, his next heir male a remr in tail, by purchase. — Otherwise (the word "next") the other added words of limitation are nugatory. (Pow. 363–4. 1 Co. 66.

(See Fearne 20 ed. [illegible]4.)

Aliter, in genl if ye limitn were to A. for life, & after, to ye heirs of his body (in ye plural), & their heirs (or heirs male). (Fearne, 141. 118. 2 Lord R. 1437. 1 Wils. 411.) — The second limitn being more nearly in ye technical form of words of limitn.

+ identified, by ye words, at ye time of making ye will.

2d. A description of the devisee may be special. — By this is meant, a description of a particular person+ — not a designation (as in the above cases) of any person, who may happen to answer the description. Pow. 365. E. g. "To A. eldest son of J. S." — Here the description designates not merely a son, but a particular son, of J. S. — Dyer 357.

Title by Devise.

Who may take by dev.e (Description of Devisees.)

If "To the heir male of the body of A. now living" - i.e. to the present heir apparent of A. (Pow 365. 1 Eq. ca. ab. 214. 1 Venta 334. 2 Id. 311. Lu 330. 3 Net. 32. 2 Vern 660.) For the word, "heir" cannot accords to y.e manifest intent, be used in its technical sense - A. being alive, at y.e time. - (p. 85.

So, "to the second son of A." - This is a special description of the second son, in order of birth. (Pow 365-6. 2 Vern. 660.

Gen. Rule: - Necessary, that the devisee answer, in all respects, the description given him. (Pow. 367.) - But it is not universally so.

Hence if devisee is described as heir of such a person, he must shew, that he is heir in that sense, in which the word is used by testator. (Pow. 367.

Thus if one devise to "the heir of B." generally; & B. is attainted of felony; B's eldest son cannot take; For B. can have no heir. (Pow. 367-8. Jenk.s 208. 1 Sid. 193.) (Note y.e description is gen.l - i.e. of anyone, who shall happen to be B's heir at law, at his death.

Title by Devise.

Who can take by devise. (Description of devisees)

So, if one devises to the "heir" of B. & dies living B.; B's eldest son cannot take: For "nemo est haeres viventis" Pow 369. 2 Leon^d 70. Dyer 99^a 64. 1 Co. 66. — Post, 105. — Description gen^l as in last ca.

So if testator describe any particular heir, as the "heir female" of B. without more; the person to take must answer the description in both particulars — i.e. she must be heir, as well as a female — Ergo, if B. has a son, his daughter cannot take — Pow 370. 3[illegible]. 385. Hob^t. 34. 2 Roll 416. 2 Mo. 8[illegible]0. Co. Litt. 28. b 24^a. 2 W. s. 1. next page. bot. — Qu. ~~[illegible]~~ vid. Estates 4. 21.

+ (in other words, if a special descript-ion is added, to y.^t of "heir"); a person, who is not heir, may take, under y.^t description:

[But if the devise itself shews, (by positive words, or necessary implic.^n) that a person, not heir general, was intended to take under the description of a particular heir†; ~~the person will take~~: E.g. "To my heir, who is my brother A.B." — Here A.B. will take, tho' not heir gen.^l Pow 373. Hob^t. 34. T Vent. 372. [illegible] Ray 185. Prec. Ch. 465. 447. 464-5. — Ante, 78.

Title by Devise.

Who may take by devise. (Description of devisees.)

So, if the intention is clear ut supra, one may take under the description of heir, in the life-time of his ancestor. As, if testator takes notice that the ancestor is living. E.G. "to ye. heir male of the body of A.~~ [illegible]~~" – giving A. also a legacy. – "Heir" construed heir apparent. (Pow. 376-8. 1 P. Wms. 229. 1 Bro. Par. Cas. 489. 2 Bl. R. 1010.) For it is ye. manifest intention of testr. yt. the son of A. shall take, while A. himself is living. He cd. not therefore mean A's heir, in the technical sense of the term.

——And it is a general rule of construction, in all questions arising upon devises, that the intention of testator shall govern, if consistent with the rules of Law+ (Doug. 327-9. Dyer 3.4. Pollex. 480.) This is the first & great rule in the exposition of devises.

+ i.e. if the nature of the limitation is such as the law allows. (ante, 4.

But there has been much doubt, whether, if an estate is given to A., remr. to the "heir" ~~[illegible]~~ female+ ~~[illegible]~~," ~~[illegible]~~ – it wd. be necessary that the person to take ~~(by purchase)~~ sh. be heir, as well as ~~male or~~ female‡. (~~And y. question is the same, if an estate is limited to the heirs female ~~of the body of a stranger.~~)

+ (~~[illegible]~~) of ye. body of B. ~~of ye. body of B.~~)
‡ child of B.

E.G. "to the heirs female of the body of J.S." will his daughter take, he having a son? Semble she will. (Pow. 381. 395. Prec. Ch. 442. 461. 5 Burr. 2617. Co. Litt. 164.a. n. 2. 1 Ventr. 372. Lug. 228 —— Co. Litt. 246. 1 Co. 73 Con. (Vid. last pa.—))

+ Of course, a person to take under that description must be strictly heir at law.

Distinction between this case & that in last page: – "Heir female" (without more) denotes heir general+. Pow. 387. Co. Litt. 27a.) – But "heir

Who can take by dev.e (Description of devisees)

Title by Devise.

"heir female of one's body," designates his female issue, whether heir general, or not. (Cow. 388. Co. Litt. 19 b. Co. 35 b.) For the law recognizes a special heir of one's body, but no special heir, except of the body.

A person, in no sense answering the description of an heir, may take under words, purporting to constitute an heir. E.g. "I devise, that my wife shall be sole heir of all my real estate." — So, to a mere stranger. — Here the word "heir" does not designate the devisee†; but the interest, which he is to take. Cow. 395-8. Hob. 75. Noy. 48. Hob. 34. Str. 308. 1 Mo. 864. 1 Freem. 293. —
The devisee takes a fee. (Cow. 398. Noy. 48.)

† (he being designated by other words);

~~[illegible]~~

But if one, by devise, makes A. heir of his lands; A. will take only his chattels real. Cow. 398 9. Noy. 45. Cro. Eliz. 471. 3 Keb. 49. Str. 301. For the devise must be intended only of such interests in lands, as one may take, as heir.

Title by Devise.

Who may take by devise.

Description of devisee, or inaccuracies.

After all, it is a general rule, that if the description is so far certain, that the person intended may be distinguished from every other person, the devise shall not fail for trifling mistakes. Pow 403. 344-5. 417. For a devise is not to be construed void for uncertainty, unless from necessity. (Pow 328-9. 422. 1 Vesey. 335. 10 Co. 57 b. Pow 345. 523. Cro Eliz. 106. Hob. 32 — (Page 91

E.g. "To Margaret the eldest daughter of J.S." — her name being Margery. Pow. 405-7. 1 Ld Raym. 293. 1 Bos. & P. (See Ante, p. 73.) — (Suppose J.S. had a younger daughter, Margaret, who wd take?

So, "To the wife of J.S." — his wife being his widow marries J.S. after testator dies — she shall take. Pow. 405. 6. 1 Mod. 371. Pow. 344. ~~[illegible]~~ — (Vid. Ante 79. & 76.

So where a man devised to his "posthumous" child, then in ventre sa mere — the child was born before his death; it was adjudged to take under the description. (Pow 406. Prec. Ch. 175.

But if the description is false, & not merely defective, the devise is void: E.g. to "the heir of J.S." — J.S. being alive, (Pow 257. 1 Bl. 193.) & not entitled to said land. For he can have no heir, here.

Title by Devise.

Devisee, if the person claiming under the Devise, is rejected to be the heir of D. (Bro. 405. 2 Sid. 151. ~~Comm~~ Ante, 73.

How a Devise may fail of taking effect.

A Devise may be ineffectual either from defects apparent upon the face of it, or from something extrinsic. Bro. 409.

Of the first kind is any uncertainty or repugnancy in the words used, as to the thing devised, or the interest in it, or as to the personal intent of the Devisor. Such uncertainty or ~~repugnancy~~ is termed a Patent ambiguity Bro. 409

Limitations contrary to the policy of law fail under the defects apparent Bro. (Bro. 409.) Ex. Perpetuities.

Title by Devise.

Failing of effect. (Uncertainty.)

Extrinsic objections to the validity of devises are founded on some uncertainty or repugnancy, arising out of facts not appearing on the face of the instrument: As where a doubt arises, to whom, of several persons, or to which of several things (respectively answering the description used) the words were intended to apply. — Uncertainty or repugnancy of this kind is called a latent ambiguity. (Pow. 409. 410.)

1st. As to defects apparent upon the face of the devise — or, patent ambiguities: —

It is a universal rule of Construction, that if there is, in a devise, + an uncertainty, which cannot be explained, or a repugnancy which cannot be reconciled; the devise is void, so far as the uncertainty extends, & the heir at law shall be preferred. Pow. 411. .... (Parol evid. is not, in genl. admitted. — (Pow. 105 — 107.). For ye qu. is matter of construction, upon ye face of ye instrumt. — wh is matter of law.

+ i.e. upon ye face of it,

Such uncertainty, as is apparent on the face of the devise, may be either as to the subject-matter, or thing devised — the quantity of intt. meant to be devised — or the person, described as devisee. (Pow. 412..

Title by Devise.

Failing of effect. (Uncertainty.) (extent)

1st As to the subject-matter: E.g. "I devise a part of my lands to A.B."

Devise of a "messuage", or "house", with the "appurtenances", carries no other land than is necessary to the enjoyment of the house, unless it appears+ that the words were intended to be used in a more general sense. 1 Bos. & Pul. 53. 12 Co. 32. Cro. Car. 57. Cro. Eliz. 16. 113. 704. 2 T.R. 498. 1 P. Wms. 600.

Parol evid. is not admitted to explain the intent.

+ from something else in the instrument

2d As to the quantity of interest:— E.g. "I devise my freehold to my wife for 5 yrs; & if any of my 3 sons die before the 5 years are out of the freehold: then, to be equally divided &c." — What to be divided &c.— the freehold or the term of 5 years? (Pow. 412. 417. 1 Keb. 692. 754. 773. Skinner 266. 2 Eq. Ca. abr. 357. — Parol evidence not admitted. Post. Pages 105–109.

3d As to the person described:— If the person described, as devisee, is absolutely uncertain; the devise is void. E.g. "To the best man in &c." (Pow. 418. 2 Anders. 12. 3 East. 172.

Title by Devise.

Failing of devise (Uncertainty) (Patent)

Ed., "to one of the sons of J. S.", he having (Post, 99) several. — So, "to 20 of the poorest of my relations" (Pow. 418. 2 Vern. 624-5. Ray. 82. 1 Roll. 609. D. 1. 1 Bulstr. 61. Cro. Jac. 260. Collect. 482. — Post, 110.

So, to my wife for life, rem. to the heirs male of any of my sons. Pow. 420. Id. 240.

No parol evidence admitted in these cases. Post page, 103. (For the ambiguity is patent, involved in the construction of the words used.

But a devise is never construed void for uncertainty, but from necessity — to be ascertained if possible. Pow. 422. 348-9. 1 Vesey 335. 10 Co. 57. b. 2 Ld. Ray. 1312. 10 Mod. 103. Hob. 32. Cro. Eliz. 106. Page 87. {87.

(Latent)

II. 8° As to uncertainty arising from something dehors — or latent ambiguity: —

If, from extrinsic facts, the person of the devisee is rendered absolutely uncertain, the devise is void: Eg. "To my son" — there being several. — "So, to A. B. of J. S." — there being two of that name there.* Pow. 304. 5 Co. 68. b.

If from extrinsic circumstances, it is absolutely uncertain what land is meant — Eg. "To my manor of A." — he having two of that name.* Pow. 425. Ante 73-57. R. 671. 2 Atk. 374-5.

*The meaning is, yt in these two cases the devise must fail, if there is no proof adduced to ascertain the person, or subject, intended. — How far parol evid. is admissible in such cases see post, 107-9.

Title by Devise.

Failure of the Devise (margin)

Inaccuracies (margin)

But if the devise were of "one of my manors of K"; the devisee might elect. Dec. Mar. 100. Pow. 425. (Such being ye presumed intention: as, if ye words had been, "either of my manors of K."

~~How far parol evidence is admissible to explain ambiguities. Pow. 485 [illegible] 6 T.R. [illegible] — 2 Atk. 374–5. Post, [illegible] ante [illegible]~~

A devise may fail of effect for divers other Causes: — Ex. gr.

(by [illegible])

Because testator's intent is contrary to the rules of law. + — ( ) E. G. To A in fee simp. & if he die without heir, to B. ‡ a stranger. Pow. 426. 1 Bulstr. 63.) 3 T.R. 145–6. Pow. Dev. 431. Sal. 234. — Vide. Estates in Lands [illegible] — [illegible] 24.

+ This is an intrinsic [illegible] 425.

‡ The devise to B. is void.

Cannot devise [illegible] a remainder [illegible] in estate; & the prior limitation is in fee: or a cont. fee, in want of [illegible] heirs, because the contingency is too remote.

+ For ye instrument is not ye testa's act in Law.

So, if in the draught of ye instrument, testator's instructions are not followed. × E.G. Testa directed a devise of land to A. for life; but the words carry a fee: — Void in toto — not good for life; for there is no devise for life. Pow. 426–7. Mo. 356. [illegible]) — not good for a fee; because ye limitation is contrary to testa's intention.

Title by Devise.

Failing of effect. ~~Uncertainty~~ (latent),

That is that which is agreeable to testators' intent, can be separated from that which is contrary; the former is good, & the latter void. E.g. Testator directs an absolute devise - & in sequence annexes a condition - The condition only is void. The devise is absolute. Pow 427. 1 Leon. 113.

(To heir or other,)

A devise may fail, because its operation, it w.d effect no more than the law w.d effect without it. E.g. ~~a man~~ a testator devises an estate in fee to his own oldest son, or next heir. The Devise is idle & void - the son takes by descent. Pow 427-8. Dyer 12. 124. 354. Hob. 29. Hargrave 17 - 2 Atk. 57. Lut. 248. Plow. 545. Stra 487. 2 Burr 880. 1 Bl. R. 187. 2 Co. 51. 1 Ld Ray. 523. 527. Sal. 233. 590. Comb. 420. 2 P. Wms 135. 1 P. Wms 397. - Post 151.

As to what acts will break the line of descent, see Co. Litt 12 b. 1 Show. 43. Sal. 337. Carth 141.

And the rule is gen.l That if one devises to a person, who is his heir the same estate - i.e. the same quantity of interest in the subject-matter, as he w.d have taken by desc.t; the devise is void - He shall be in by descent & not by purchase;+ Pow 427. 430. 435. 13 Ld Ray. 728.

+ his heir not as devisee.

34.

Titles of Real... (... as to ...)

Title by Devise.

The reason of the rule is, first, that the lord may not be defrauded of the fruits of the tenure + (Pow. 355. 430.) – 2.° that devisor's creditors may not be defrauded of their debts (Pow. 430 – 438. 1 Preem. 245); as they w.d have been before the Stat. ag.t fraudulent devises (3 & 4 W. & M. c. 14. 2 Bl. 378. Pow. 438. 471 – 3. 4 Bac. 50.

[Qu. Is not y.e dev.e void, as ag.t cred.rs, upon com. law prin.? ?]

+ i.e. of his claims upon heirs, succeed.g to lands by descent

These reasons have both ceased: – but the rule is still of consequence (in Eng.) as affecting the course of descent from the heir. (2 Bl. 220 – 2. Pow. 435 – 6. 2 Leo. 127. For y.e line of descent in ca. of land purchased, may be diff.t from y.t of land, acquired by descent.

In gen.l, in Conn.t y.e rule is, to most purposes, not important. Neither of the above considerations operates here. + [But suppose a person having two heirs, & ... B. devises half of his estate to A. & dies intestate as to the other half: The part, which is considered as descending, w.d be first applied to the payment of debts. – But this does not seem to render the rule important here, in the sense contemplated; so the case is not within it. – & w.d take by devise accord.g to the distinctions in Pow. 435 – 441. ‡ ...] – Might it however be important in y.e ca. ... of a posthumous heir. (p. 95.) – See also another ca. p. 97. s. 2.

+ For y.e line of descent is y.e same, as to lands acq.d by descent & devise, & by deed of gift, from an ancestor.

‡ For under y.e devise he must take in a manner diff.t from what he w.d by descent – by descent, he w.d take a moiety in co-parcenary.

Title by Devise.

Failing of effect to heir at law.

If one devises to his heir by way of remr. what wd. descend to him as a reversion; still the Case is with in the general rule: For the estate is not altered. Eg "To my wife for life, remr. to J.S." – J.S. being devisor's next heir. – Devise to J.S. is void. (Pow 433. 435-6. Sti. 148. 1 Roll 626. Stra 471. 2 Leon. 101. 3 Sh. 118. Sau. 234. Com. 82. 1 P. Wms 23. 2d Raym. 508. 3 Lev. 127.) He takes the reversion, & also the life-estate, by descent: i.e. precisely as he wd. take, if ye. limitn. to ye. wife were ye. only one, in ye. devise.

So, of a devise of an estate for life only, to devisor's heir at law, if no further disposition is made of the subject-matter: For he takes all ye. interest which he wd. have taken, if there had been no devise – & the fee simple, which descends, merges the estate for life. (Pow. 431-2. 3 Leon. 26.) – Aliter, if ~~(a different ... of int. ... devised to him, &)~~ ye. residue of ye. int. is devised to another.

+ yt. ye. fee,

Charging debts or portions on an estate devised to the heir of devisor, does not enable him to take by purchase: For the quantity of interest is not altered – the propy. is only encumbered. (Pow. 433-5. Ca. Ez. 833. 919. Mo. 674. 2 Bl. 156. Pow 72. Sal. 241. Stra 1270. 1 Bl. R. 22. 1 Ld Raym. 728.) (Post. 98.)

Freeing of Effect.
(To heir at Law.)

Title by Devise.

But it has been holden, that if the Charge on the land is by way of Condition; the heir, to whom it is devised, takes by purchase. E. G. "To my eldest son, & his heirs, upon Condition that he pay" &c — or, "Provided he pay" &c. Pow. 436-8. Cro. Car. 161. 2 Mod. 286. 1 Freem. 248.)

— But the weight of auth'y is ag. this distinction. Pow. 433. 434. 138. Com. 72. Gil. 242. Cro. El. 833. 919.

When a devise is made, (which falls within the general rule), to testator's "heir", who, at the devisor's death, happens to be a Daughter; the birth of a posthumous son will divest her title. (Pow. 438-9. 2 Bl. 208.) For she takes by descent as heir, (because, at the testator's death, she is his heir) & hence her estate is liable to be divested by the birth of the posthumous son, as if no devise had been made. — Aliter, if she took, by purchase. — This rule is important, under our law, also. (see p. 94. bot.)

If An alteration, by devise, as to the time of the heir's receiving the estate, does not enable him to take by purchase; ~~Pow. 439. 430-1. 434. Sti. 148. Gil. 234. 241. Com. 72.~~ (& the quantity of interest being the same): Pow. 430. 430-1. 434. Sti. 148. Gil. 234. 241. Com. Ed. 72): —

— Yet, if the limitation to the devisor's heir, by devise, produces an alteration in the

course

Title by Devise.

[illegible] heir [illegible]

Course of descent; he takes by purchase i.e. as devisee. E.g. If one, having two daughters, who are his heirs, devises to them & their heirs; they take as devisees: For the devise makes them joint tenants; whereas if they ~~take~~ took as heirs, they ~~are~~ w^d be coparceners, each having a distinct moiety. Pow 454. Cro Ez. 431. 3 Lev^s 127-8. (1 Leon^d. 112-3.) Ante, 94.

± by y^e devise, & y^e other half descended; ~~[illegible]~~

So, if one, having two daughters who are his heirs, devises all his estate to one; she takes the whole, by purchase: For if she took only half ± ~~by the devise~~, her sister w^d be Coparcener with her of the other half, & the intent defeated – (Pow 441. Cokill 163. b. Sal. 242. Com 123. L^d Ray^d 829.) ~~Indeed,~~ For y^e testa's intent was, y^t she sh^d take y^e whole – w^h she c^d not take, by descent. – In such cas^e, y^e distinction is material, under our law.

And a devise may, upon the general principle in ~~[illegible]~~ question, be good in part, & void in part, as to one entire thing. E.g. Tenant in fee devises one half of Blackacre to B. his heir, in fee, the other half to him in tail: – it is void as to the former, good as to latter. Pow. 442. (2 L^d Ray. 830.) For as to the former, the devise gives to him the same interest, as the rule of descent w^d give him: As to the latter it gives him a different estate.

Title by Devise.

Failing of effect. (Lapsed.)

~~Lastly~~ A devise may fail of effect by the death of the devisee, the testator living — E.g. "To A. & his heirs" — A. dies living the testator — A's heirs cannot take.+ And thus is the case, even tho' the devise is republished after A's death,≠ (4 T. R. 601. Plow 340. 345. 2 Vern 722. Stra. 25. 1 P. Wms 597. Doug. 323. Ca. Ex. L. 423. Ray. 408. 1 Mod. 267. 2 Ch. 313. Pow. 676-7. Prec. Chy 439. Rep 118. Page.. } 105.

§§ But if a charge is created on the estate as debts or legacies, the charge remains. (2 New Rep 349. Vines abr. title "Charge" — [illegible] devisee's death. Ante, 94) it does not depend upon his taking.

+ [illegible] to A. [illegible] the devise [illegible] what [illegible] shd take [illegible]

≠ [illegible] being [illegible] time of republica[tion] to a dead man. [illegible]

By a late St. of Conn. if devisee, or legatee, being a child, or grandchild, of testator, dies before testator, (no provision made for such contingency); the issue of devisee shall take as he w^d have taken.+ (St. [illegible]. 272.) — If no such issue, [illegible] the prop. devised to such [illegible] as intestate — or y^e dev. lapsed.

+ [illegible] survived testat.

Relinquish)

(Waiver: — A devise may also fail of effect, by devisee's waiving the benefit of it. The waiver may be express or implied. Pow 442-3.

The waiver is express, when devisee actually refuses, in terms, to accept the devise. Pow 443.

An implied waiver arises from some act of the devisee, from which it is inferred, that he does not accept. (Pow 443.)

~~[illegible]~~

Ex.

Title by Devise.

(Waiving of a right — waiver) — in opposition to yᵉ will;

It is a general rule in equity, that if a devisee having a right to part of what is devised, independently of the devise, & a claim to another part, only under the devise, & insists on the former; he waives the latter. — Implied waiver. — E. G. Black Acre is settled on A. for life, remr. to his younger son B.; — A devises black acre to a stranger, & white acre to yᵉ son B. — If B insists on having black acre, under the settlemt. he cannot have white acre, under the devise. (Cow 443. 454. 2 Vern 581. 582-3. Talb. 176.

White acre is settd. in fee.

Same rule holds, when testa's widow claims dower in opposition to his will, & an estate under it.

This doctrine of implied waiver is founded on the idea of a tacit condition, annexed to devises, "that the devisee do not disturb the disposition, that testator has made." (Cow 445-6. 453-4. Talb. 176. 2 Ves. 14. 617. &c. When he does disturb it, he forfeits, or waives, all claim under it. For he ought not to assert a right in opposition to the will, & at the same time, claim a matter of mere bounty under it.

And it is not necessary to give effect to the rule, that the thing devised be of the same nature, or of equal value, with that to which the devisee has a claim independently of the devise. Cow 450-2. 1 Vesey 238. 426.

See 1 Fon. B. 2. p. 112, as to yᵉ mode of election where devisees are under age, or entitled to devises.

In such cases equity will require the devisee to make his election.* Cow 450. 453-4. Talb 176. 2 Vesey. 14.

(C)

Title by Devise.

But if the devisee is a creditor, (claiming under y^e. devise in y^t. character) & not as a mere volunteer; the rule does not apply. E.g. if one devises a part of his estate for the payment of debts, & devises to A. B. another part, to which a creditor has a higher title than devisor; the creditor may assert his title to the latter, & still claim his share of the assets devised to pay debts. — ~~For the estate devised to A. B., viz. Creditors.~~ (Pow. 454–8. 465. 2 P. Wms. 412. 2 Vesey 617. – Ib. 30. Pow. 463.)

For the estate devised to y^e. use of creditors, & his claim under y^e. devise for payment of debts, is not thus in the preceding case in grantee, but by virtue in title: And equity does not forbid him to assert a right ag^t. the will, & at the same time insist upon a claim of justice under it.

So if land, to which A. has a higher claim than testator, is devised to B. by an instrument not executed, so as to pass lands; & a legacy to A: he may claim the legacy and hold y^e. land. ~~[illegible]~~. Here, the tacit condition does not apply. For testator has not in law disposed of the land; as to that, there is no devise. (Pow. 458 &c. 1 Vesey 298. 307.) – For y^e. devise not being executed according to y^e. stat. is, quoad y^e. land, ~~[illegible]~~ (& independently of any question, as to y^e. testator's title), a nullity.

But still, if there is an express clause in the devise, that a legatee, disputing the will, shall forfeit his legacy; his claiming the land, devised as in the last case, will defeat his legacy. For this w^d. be, in violation of an express cond^n. annexed to y^e. legacy + (Pow. 460. 432. 1 Ves. 12.); & to support y^e. legatee's claim to y^e. legacy, w^d. defeat y^e. express intention of y^e. testator. According to y^e. very terms of y^e. will, y^e. legatee has no title.

+ – (a cond^n. w^h. testa. had a right to make);

[…]ailing of effect. [W]aiver.)

Title by Devise.

If testator gives a legacy to one in satisfaction, or instead, of a particular thing expressed; that shall not exclude him from another benefit, tho' legatee's claiming the latter, may be contrary to the testator's Will. E.G. Testator's wife is entitled, under marriage agreement, to a portion in land, & another in money. — He gives her a legacy, in satisfaction of the money-portion, & devises the land to J.S. — She may claim both land & legacy. (Pow 463. 2 Vesey 30.): But she cannot claim both the legacy & the money-portion. For the legacy is expressed to be in lieu of that, tho' not of the land. — What takes it out of the gen^l rule (p. 23) is, that the object of the legacy, as a satisfaction, is expressly confined to the money-portion (which was already the creditor's); & her claim to the land is also of [illegible] justice, & ought not to extend etc. +

+ satisfaction is that by construction.

And in all cases, in order to oblige devisee to elect, (ut ante), it must be clearly evinced, that the devisee's taking both interests, will defeat the gen^l intent of devisor. — E.G. Testator, having devised black acre, to his wife immediately, devises to her white-acre, by way of rem^r. — This does not prevent her from claiming dower in white-acre +. Pow 466–9. 3 Atk^s 430. 2 Vern 365. L^d Raym^d 438. 1 Vesey 230. 2 Eq. ca. abr. 301. 8 Vin^r 244.)

+ For the claim is not ag^t any manifest intention of testa^r.

So, a wife may claim her marriage settlem^t (tho' not devised to her), & a residuary legacy. — For, in neither of these cases are the claims of the wife clearly repugnant to testa^r's intention.

Satisfied by testa^r.)

A devise may fail of effect, by testator's performing, in his life-time, what it was the object of the devise to accomplish. E.G. Testator bequeathed £400 to complete a build.^g + & afterwards, before his death, expended more than that sum on the house. His heir shall not have the benefit of the bequest. (Pow. 470–1 1 Vern. 95.)

+ for the benefit of his heir,

Title by Devise.

Failing of effect. (By stat. ag^t fraud^t devises)

2^o, a devise may fail of effect, in consequence of the Stat. 3 & 4 W. & M. ag^t fraudul^t devises. Under this Stat. all devises of land are void, as ag^t devisor's bond Creditors – i.e. the Creditors are entitled to satisfaction out of the land if the other assets fail. Heir & Devisee must be sued jointly. (Pow. 471–4. 2 Bl. 378. 3 Bac. 27 (Notes 42.1) 3 Atk^s 434. 2 Ib. 125. 1 P. W^ms 129.

+ excluded y^e testa's creditors.–

Before this Stat. devisees (selling or aliening, before action br^t, says Pow.)+ ~~[illegible]~~ ~~the creditors~~ (Pow. 473–) Suppose no alienation? (2 Bl 378. 3 Bac 27.): then I conclude.

This Stat is liberally construed. Pow 473. 2 Atk^s 205.

The general law relating to the settlement of the estates of dec^d persons, in Conn. gives all Creditors a preference to devisees. St. Con. 168 § 22.

+ i.e. y^e stat, by subjecting lands in y^e hands of devisees, does not discharge lands in y^e hands of y^e heir, by descent.

This Eng^h Stat. affects the relative rights of Creditors & devisees only. – It does not relate to those of heir & devisee.+ Therefore, lands descended are liable, to Creditors, before lands devised. Devisee ~~a~~ purchaser. (Pow. 474–5. 2 Atk^s 435. 3 Co. 12 b.

☞ See the remainder of this title in another book